Supreme Court, U.S.
FILED

961890 MAY 28 1997

OFFICE OF THE CLERK

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HECTOR BERELLEZ, BILL WATERS,
PETE GRUDEN and JACK LAWN,
Petitioners,

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

MICHAEL L. MARTINEZ
Counsel of Record
GLORIA B. SOLOMON
HOLLAND & KNIGHT LLP
2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037
(202) 955-3000
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

105 pp

QUESTIONS PRESENTED

1. Whether the Ninth Circuit's decision, which affirmed the denial of petitioners' motion to dismiss on grounds of qualified immunity without determining whether each of respondent's claims considered separately constituted a violation of clearly-established law, is inconsistent with the qualified immunity doctrine as developed by this Court, the Ninth Circuit itself, and other circuits?

2. Whether the Ninth Circuit's decision, which affirmed the denial of petitioners' motion to dismiss on grounds of qualified immunity even though the complaint failed to raise any specific factual allegations about petitioners' allegedly wrongful conduct, is inconsistent with the qualified immunity doctrine as developed by this Court, the Ninth Circuit itself and other circuits?

3. Whether a *Bivens* complaint should be permitted to withstand a motion to dismiss asserting qualified immunity if the complaint does not set forth specific factual allegations of conduct that is violative of the Constitution?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings of this case are as follows: Respondent Humberto Alvarez-Machain is the plaintiff. Petitioners Hector Berellez, Bill Waters, Pete Gruden and Jack Lawn are defendants. Also named as defendants are the United States of America, Francisco Sosa, Antonio Garate-Bustamante, and "five unnamed Mexican nationals currently in the federal witness protection program."

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND FEDERAL RULE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. THE NINTH CIRCUIT'S FAILURE TO APPLY THE QUALIFIED IMMUNITY ANALYSIS MANDATED BY THIS COURT RESULTED IN A DECISION WHICH CONFLICTS WITH DECISIONS OF THIS COURT, THE NINTH CIRCUIT AND OTHER CIRCUITS	8
A. The Ninth Circuit's Cursory Analysis of Whether Respondent Has Alleged Violations of Clearly Established Law Is Erroneous and Inconsistent With Governing Case Law	10
B. The Ninth Circuit's Failure to Apply the Proper Qualified Immunity Analysis Allowed Respondent's Claims to Stand Despite the Fact That Respondent Has Not Alleged Specific Wrongful Conduct by the Petitioners	14
II. THE LEGAL STANDARD APPLICABLE TO A MOTION TO DISMISS ON QUALIFIED IMMUNITY GROUNDS IS AN IMPORTANT ISSUE WHICH THIS COURT SHOULD DECIDE	17
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
Act Up!/Portland v. Bagley, 988 F.2d 868 (9th Cir. 1993)	9
Anderson v. Creighton, 483 U.S. 635 (1987)	9, 12, 17
Behrens v. Pelletier, 116 S.Ct. 834 (1996)	8, 10, 17
Bell v. Wolfish, 441 U.S. 520 (1979)	11
Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)	3
Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1097 (1995)	15
City of Revere v. Massachusetts General Hospital, 463 U.S. 239 (1983)	11
Collins v. Cundy, 603 F.2d 825 (10th Cir. 1979)	13
Crawford-El v. Britton, 93 F.3d 813 (D.C. Cir. 1996) (*en banc*), *petition for cert. filed*, No. 96-827 (Nov. 25, 1996)	19
Dunbar Corp. v. Lindsey, 905 F.2d 754 (4th Cir. 1990)	19
Gregg v. Georgia, 428 U.S. 153 (1976)	7
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	9, 10, 17
Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982)	7, 11, 12, 14
Hunter v. Bryant, 502 U.S. 224 (1991)	9
Kartseva v. Department of State, 37 F.3d 1524 (D.C. Cir. 1994)	19
Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993)	19
Martin v. Sargent, 780 F.2d 1334 (8th Cir. 1985)	13
May v. Baldwin, 109 F.3d 557 (9th Cir. 1997)	13
Mendocino Environmental Center v. Mendocino County, 14 F.3d 457 (9th Cir. 1994)	19
Mendoza v. Block, 27 F.3d 1357 (9th Cir. 1994)	9
Mitchell v. Forsyth, 472 U.S. 511 (1985)	7, 17
Oltarzewski v. Ruggiero, 830 F.2d 136 (9th Cir. 1987)	13
Pritchett v. Alford, 973 F.2d 307 (4th Cir. 1992)	10
Reynolds v. County of San Diego, 84 F.3d 1162 (9th Cir. 1996)	10

TABLE OF AUTHORITIES—Continued

	Page
Siegert v. Gilley, 500 U.S. 226 (1991)	9, 16
Somers v. Thurman, 109 F.3d 614 (9th Cir. 1997)	10
Taylor v. List, 880 F.2d 1040 (9th Cir. 1989)	15
Thomas v. Cabanow, 1991 WL 183868 (N.D. Ind. 1991), *aff'd*, 978 F.2d 1261 (7th Cir. 1992)	13
Triad Associates, Inc. v. Robinson, 10 F.3d 492 (7th Cir. 1993)	10
United States v. Alvarez-Machain, 504 U.S. 655 (1992)	5
United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Ca.), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 655 (1992), *on remand*, 971 F.2d 310 (9th Cir. 1992)	3, 4, 5, 16
Veney v. Hogan, 70 F.3d 917 (6th Cir. 1995)	17, 19
Wicks v. Mississippi State Employment Services, 41 F.3d 991 (5th Cir.), *cert. denied*, 115 S. Ct. 2555 (1995)	17, 19
Willis v. Bell, 726 F. Supp. 1118 (N.D. Ill. 1989), *modified on other grounds*, 999 F.2d 284 (7th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994)	13
Wilson v. Seiter, 501 U.S. 294 (1991)	11, 12, 14
Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675 (9th Cir. 1984)	16

Constitution, Statutes, and Rules of Procedure

U.S. Constitution Amendment V	2, 10
U.S. Constitution Amendment VIII	2, 11
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1292	7
28 U.S.C. § 2679	6
42 U.S.C. § 1983	19
Fed.R.Civ. P. 8	3, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. ———

HECTOR BERELLEZ, BILL WATERS,
PETE GRUDEN and JACK LAWN,
Petitioners,

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners Hector Berellez, Bill Waters, Pete Gruden and Jack Lawn respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit is reported at 107 F.3d 696 (9th Cir. 1997) and is reprinted in the Appendix at 1a-14a. The initial opinion of the United States Court of Appeals for the Ninth Circuit is reported at 96 F.3d 1246 (9th Cir. 1996) and is reprinted in the Appendix at 15a-28a. That Court's Order denying rehearing and rehearing *en banc* is reprinted in the Appendix at 77a-78a. The

Memorandum Opinion of the United States District Court for the Central District of California is unreported. It is reprinted in the Appendix at 29a-76a.

JURISDICTION

The Court of Appeals issued its initial opinion on September 24, 1996. Timely petitions for rehearing and suggestions for rehearing *en banc* were filed by petitioners and all other parties. The Court of Appeals issued its amended opinion on February 19, 1997. The Court of Appeals denied all petitions for rehearing and rehearing *en banc* on February 27, 1997. Appendix at 77a-79a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULE INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Rule 8 of the Federal Rules of Civil Procedure in applicable part provides:

> (a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

STATEMENT OF THE CASE

In this action, plaintiff/respondent Humberto Alvarez-Machain seeks to recover money damages in a *Bivens*[1] action for alleged violations of the United States Constitution by petitioners. Respondent claims to have suffered mistreatment in connection with his arrest in Mexico and removal to the United States by federal agents in 1990. Petitioners assert that they are entitled to qualified immunity from suit.

This case arises out of the 1985 torture and murder in Mexico of Drug Enforcement Administration ("DEA") Agent Enrique Camarena. On the evening of April 2, 1990, respondent—who was then under indictment for Camarena's murder in the United States District Court for the Central District of California—was captured in Mexico. Respondent was brought into the United States at El Paso, Texas, sometime on April 3, 1990, where he was released to DEA officials.[2]

---

[1] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] The factual background of this case is set forth in detail in the criminal proceedings that preceded this litigation. *See United*

Respondent alleges in the First Amended Complaint ("Complaint") that he was interrogated by DEA officials that same day and that he was mistreated in various ways upon his arrival in the United States. Respondent also alleges that he suffered chest pains and a possible "heart attack" on the morning of the next day, April 4, 1990, and was transferred to a medical facility in El Paso. On April 10, 1990, he was moved to Los Angeles, California for arraignment and trial. Complaint, ¶ 20. All of respondent's surviving claims against petitioners relate solely to treatment he allegedly received between the time he arrived in El Paso on April 3, 1990, and went to the hospital on April 4, 1990.

Before commencing this civil action, respondent had separately raised claims of mistreatment in connection with his capture and arrest in an effort to have his indictment dismissed. These claims were rejected early on. According to the district court judge who presided over respondent's criminal proceedings, respondent was asked upon his arrival in El Paso:

> whether he had been tortured, mistreated, or abused. Dr. Machain answered that he had not, though he complained that he had injured his finger on the door of the aircraft.

745 F. Supp. at 604.[3] The court found that:

> [s]hortly after his arrival, Dr. Machain complain[ed] of a pain radiating from his chest and pressure in his chest. He received prompt medical treatment from

---

States v. Caro-Quintero, 745 F. Supp. 599, 601-04 (C.D. Ca.), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 655 (1992), *on remand*, 971 F.2d 310 (9th Cir. 1992).

[3] The Honorable Edward Rafeedie, United States District Judge for the Central District of California, held an evidentiary hearing in appellee's criminal case on May 25, 1990 and based his factual conclusions on the testimony presented at that hearing. *See* 745 F. Supp. at 601.

> Dr. Mesa, a Spanish-speaking physician at Thomason General Hospital in El Paso. Dr. Mesa testified that he examined Dr. Machain from head to foot and found no sign of mistreatment or abuse. Dr. Machain did not mention any mistreatment or abuse. Dr. Mesa prescribed a pain killer. Dr. Machain was subsequently treated by various other medical personnel during his incarceration. At no time did he indicate to the treating personnel that he had been mistreated by his kidnappers.

Id.

Based on these factual determinations, which plainly encompass the period of April 3-4, 1990, Judge Rafeedie concluded that "Dr. Machain's allegations of mistreatment are not worthy of belief," that when he had received his "prompt medical treatment" he said nothing about mistreatment, and thus that, "Dr. Machain's *recent allegations of abuse are simply not credible.*" 745 F. Supp. at 605-06 (emphasis supplied).

Following lengthy criminal proceedings, including an opinion by this Court,[4] respondent was granted a judgment of acquittal in the district court at the completion of the Government's criminal case. The respondent then commenced this action asserting, among other things, *Bivens* claims against these four petitioners. For purposes of this petition, the relevant allegations in respondent's *Bivens* action are that he was met at the El Paso airport by petitioner Berellez and others who informed him he was under arrest. He "was taken to another location and interrogated," during which time he "was threatened by DEA agents. [He] was also denied food during the interrogation." Complaint at ¶ 17.

Respondent also alleges that after this "interrogation . . . DEA Agents, including Defendant Berellez" held him under a false name thereby making it difficult for family and others

---

[4] *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

to locate him. Complaint ¶ 19. Finally, respondent also alleged that he received inadequate medical attention between April 4 to April 10, 1990. Complaint ¶ 18. He later withdrew that allegation. Appendix at 32a n.3; 52a n.10.

Petitioners promptly moved to dismiss arguing, *inter alia*, their entitlement to qualified immunity. The district court (the Honorable John G. Davies) granted the motion in part and denied it in part.[5] The court held that once respondent arrived in the United States, "he was protected by the Constitution from mistreatment at the hands of his captors." Appendix at 51a. After noting that the Eighth Amendment provides a "baseline of care" for pretrial detainees, the district court held that "[t]hree potential constitutional violations emerge from paragraphs 17 and 19 of the First Amended Complaint." *Id.* at 51a-52a. The district court articulated the three "potential" violations as: "(1) the DEA agents including Berellez 'threatened' Alvarez while interrogating him on April 3-4; (2) the agents denied him food during this time; and (3) the DEA initially incarcerated him under a false name, making it impossible for Alvarez to be reached by his family, attorney or the Mexican government." *Id.*[6]

The district court also observed that:

---

[5] Pursuant to 28 U.S.C. § 2679, the district court substituted the United States as the defendant for all nonconstitutional claims against petitioners. Appendix at 37a-42a. The district court also granted petitioners qualified immunity for all constitutional claims arising out of alleged conduct in Mexico. *Id.* at 43a-51a. Qualified immunity was denied petitioners for constitutional claims arising out of alleged conduct in the United States. *Id.* at 51a-52a.

[6] In a footnote, the district court also noted that in paragraph 51 of the First Amended Complaint, as part of his claim for intentional infliction of emotional distress, respondent alleged that Berellez and others "threatened [him], locked him in a small windowless room when he refused to cooperate, and forced him to stand naked and be photographed." Appendix at 52a n.10. The district court stated that it was "unclear whether Alvarez claims that this incident amounted to a constitutional tort." *Id.*

> [e]xcept as these claims identify Berellez, the involvement of the [petitioners] is unclear, rendering it difficult to determine whether they personally participated in or directed the conduct at issue, or knew of the conduct and failed to prevent it.

Appendix at 52a. Despite the conclusory nature of the allegations in the complaint, and even though the court acknowledged that supervisors are not vicariously liable for the constitutional torts of their subordinates, the district court concluded that "the allegations of constitutional wrongs in the United States are sufficient to defeat [petitioners'] claim to qualified immunity" because plaintiff "may be able to prove that the [petitioners] violated his clearly established constitutional rights." *Id.* Thus, the petitioners were denied qualified immunity as to these three claims.

Petitioners and all other parties noticed interlocutory appeals. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985); 28 U.S.C. § 1292. Following full briefing and oral argument, the Court of Appeals disposed of petitioners' qualified immunity arguments in two paragraphs. Appendix at 23a-24a. In the first paragraph, the panel noted that pre-trial detainees "possess a clearly established right to be free from punishment," and that the Eighth Amendment:

> proscribes . . . sanctions that are "so totally without penalogical justification that it results in the gratuitous infliction of suffering." Convicted prisoners and pre-trial detainees are also entitled to "adequate food, clothing, shelter, sanitation, medical care, and personal safety."

Appendix at 23a; 96 F.3d at 1251, quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982) and *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

In its second paragraph, the panel noted that the First Amended Complaint "reveals" that petitioners:

> "threatened" [respondent] during an interrogation session on April 3, 1990; withheld food throughout the interrogation; incarcerated him under a false

> name . . . and denied him medical attention. Each of these allegations, if proven, served to create an atmosphere of "gratuitous suffering" in violation of *Hoptowit*. Further, the deprivation of food and medical attention alone could serve to sustain a claim under the due process clause. *Id.* Accordingly, the district court did not err in denying [petitioners'] motion to dismiss these claims.

Appendix at 23a-24a; 96 F.3d at 1251.

All parties, including petitioners, timely filed petitions for rehearing with suggestions for rehearing *en banc*. On February 19, 1997, the Court of Appeals issued an amended opinion. The amended opinion, however, did not alter or amend in any way the Court's initial opinion with respect to petitioners. Appendix at 9a-10a. On February 27, 1997, the Court of Appeals issued an Order denying all petitions for rehearing and for rehearing *en banc*. *Id.* at 77a-78a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S FAILURE TO APPLY THE QUALIFIED IMMUNITY ANALYSIS MANDATED BY THIS COURT RESULTED IN A DECISION WHICH CONFLICTS WITH DECISIONS OF THIS COURT, THE NINTH CIRCUIT AND OTHER CIRCUITS.

In *Behrens v. Pelletier*, 116 S.Ct. 834, 839-40 (1996), this Court recognized, as it has on many prior occasions, that when a government official's motion to dismiss on qualified immunity grounds is rejected, the official is conclusively denied some of the protections the immunity doctrine is intended to provide—namely, the right to avoid the burdens of pretrial litigation processes such as discovery. For this reason, it is critical that a court faced with such a motion carefully apply the proper legal analysis.

In this case, however, the Ninth Circuit, which in two paragraphs cursorily denied petitioners' motion to dismiss,

wholly failed to apply the legal standards developed by this Court and by the Ninth Circuit itself. As a result, the Ninth Circuit has established a precedent in conflict with decisions of this Court and other courts which, if allowed to stand, will significantly decrease the protection afforded to government officials by the qualified immunity doctrine. Indeed, the Ninth Circuit completely abdicated its responsibility to analyze correctly petitioners' assertion of qualified immunity.

The objective analytic framework a court must apply when faced with a claim of qualified immunity was set forth by this Court in a line of cases beginning with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The threshold question is whether the law applicable to the challenged conduct was clearly established at the time. *Harlow*, 457 U.S. at 818-19. If the law was not clearly established, then the claim of qualified immunity must prevail. *Id.* The court must also consider whether the facts alleged by the plaintiff assert a violation of a constitutional right at all. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Finally, even if the law was clearly established and the plaintiff has alleged facts which assert a violation, the defendant is still entitled to qualified immunity if a reasonable official in his position would have believed the conduct to be lawful. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *see also Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

Prior to the decision in this case, the Ninth Circuit had formulated a two-part analysis for qualified immunity determinations:

> 1) Was the law governing the official's conduct clearly established? 2) Under that law, could a reasonable official have believed the conduct was lawful?

Act Up!/Portland v. Bagley, 988 F.2d 868, 871 (9th Cir. 1993); *see also Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994). The Ninth Circuit has subsequently

reiterated this standard. *See Somers v. Thurman*, 109 F.3d 614, 617 (9th Cir. 1997).[7] Other circuits apply a similar analysis. *See Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992); *Triad Associates, Inc. v. Robinson*, 10 F.3d 492, 496 (7th Cir. 1993).

On a motion to dismiss, therefore, the court must test the allegations in the complaint against the governing legal standard for qualified immunity. *See Behrens v. Pelletier*, 116 S.Ct. at 840 (at the motion to dismiss stage, "it is the defendant's conduct as alleged in the complaint that is scrutinized for 'objective legal reasonableness' "). The Ninth Circuit, which was obliged to review the denial of the motion to dismiss *de novo*, failed to engage in the proper analysis and, therefore, denied petitioners the protection to which they are entitled by the qualified immunity doctrine.

A. The Ninth Circuit's Cursory Analysis of Whether Respondent Has Alleged Violations of Clearly Established Law Is Erroneous and Inconsistent With Governing Case Law.

As noted above, the threshold question in the qualified immunity analysis is whether the law applicable to the government official's challenged conduct is clearly established. *Harlow*, 457 U.S. at 818. Although the Ninth Circuit's decision makes a brief allusion to this issue, it wholly fails to apply this Court's, or even its own, requisite analysis necessary to resolve the qualified immunity inquiry properly.

Respondent's claims are based on allegations concerning his treatment while being interrogated by DEA agents on April 3, 1990. Although the due process clause of the Fifth Amendment governs the rights of a pre-trial de-

---

[7] In *Reynolds v. County of San Diego*, 84 F.3d 1162, 1167 (9th Cir. 1996), the Ninth Circuit described the analysis as a three-part test, adding as the initial inquiry the question of what legal right was allegedly violated.

tainee, *see Bell v. Wolfish*, 441 U.S. 520 (1979), Eighth Amendment case law prescribes the minimum standard of care. *See City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983). This Court has made it clear that in assessing a claimed violation of the Eighth Amendment, a court may not simply conflate all of a plaintiff's claims of mistreatment and find that the "overall conditions" to which the plaintiff is subjected constitute improper punishment. *See Wilson v. Seiter*, 501 U.S. 294, 304-05 (1991). Instead, the court must address each claimed violation separately, and determine whether each resulted in a deprivation of constitutional proportions. The Ninth Circuit has required the same issue-by-issue analysis of Eighth Amendment claims. *See Hoptowit v. Ray*, 682 F.2d 1237, 1246-47 (9th Cir. 1982).

The Ninth Circuit's decision at issue here, however, utterly ignores that precedent. Indeed, it takes precisely the type of "totality of circumstances" approach explicitly forbidden by the case law. The Ninth Circuit's opinion lists four alleged constitutional violations which the district court discerned from the complaint: that a DEA agent "threatened" respondent during an interrogation session; that food was withheld; that respondent was incarcerated under a false name; and that respondent was denied adequate medical attention.

As a preliminary matter, it must be noted that the Ninth Circuit's reliance on the denial of medical attention claim was wholly mistaken, since respondent withdrew this claim before the case ever reached the appellate court. Appendix at 32a n.3; 52a n.10.[8] Moreover, rather than analyzing each violation separately, the Ninth Circuit simply asserted that "[e]ach of these allegations, if proven,

---

[8] The fact that respondent withdrew the claim based on denial of medical attention was mentioned by petitioners in both their initial appellate brief as well as in their petition for rehearing. Nevertheless, the Ninth Circuit failed to correct its error in its amended opinion. Appendix at 10a.

served to create an atmosphere of fear and isolation, imposing 'gratuitous suffering' in violation of *Hoptowit*." Appendix at 10a. This analysis is in direct conflict with both *Wilson v. Seiter* and *Hoptowit*.

Not only was the Ninth Circuit required to consider each alleged deprivation separately, it was also required to determine whether the law with respect to each such violation was clearly established under the particular circumstances before it. *See Anderson v. Creighton*, 483 U.S. at 639-40. The general statement, standing alone, that standards under the Eighth Amendment are clearly established because the case law indicates that the Eighth Amendment prohibits the "gratuitous infliction of suffering," does not satisfy this requirement. *Id.*

The Ninth Circuit's only attempt at particularized consideration of respondent's claims appears in its statement —which again relies on the erroneous belief that improper medical treatment was a viable claim before it—that "the deprivation of food and medical attention alone could serve to sustain a claim under the due process clause." Appendix at 10a. The Court of Appeals did not undertake any further analysis of respondent's specific claims. The court's erroneous approach led to its erroneous conclusions that the law with respect to respondent's three pending claims was clearly established and that respondent had alleged violations of his constitutional rights.

The Ninth Circuit erred in concluding that respondent's allegation that he had been threatened during the interrogation stated a violation of clearly-established law. In the first place, respondent's complaint contains no information about the alleged threats, including what was said, who said it, the context in which the alleged threats were made or the alleged consequences to respondent of the alleged threats. Indeed, the district court acknowledged as much. Appendix at 52a. Thus, respondent has not alleged sufficient facts for the court even to determine whether any rights were violated. Moreover, both the Ninth Circuit and other courts

have explicitly found that "[v]erbal harassment or abuse" of prisoners "is not sufficient to state a constitutional deprivation." *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987), quoting *Collins v. Cundy*, 603 F.2d 825, 827 (10th Cir. 1979). *See also Martin v. Sargent*, 780 F.2d 1334, 1338 (8th Cir. 1985) ("[v]erbal threats are not constitutional violations"); *Thomas v. Cabanow*, 1991 WL 183868, *12 (N.D. Ind. 1991), *aff'd*, 978 F.2d 1261 (7th Cir. 1992) (citing numerous cases for the proposition that "[i]t is well-established that allegations of verbal abuse and threats, as well as threatening gestures and conduct by correctional officers and officials" do not state constitutional violations). Had the Ninth Circuit properly considered this case law, it could not have concluded that respondent's alleged right to be free from threats was clearly established. Its denial of qualified immunity with respect to this claim is plainly erroneous.

Respondent's allegations concerning the alleged deprivation of food are likewise devoid of details. Although petitioners do not dispute that a deprivation of food, in some circumstances, can reach constitutional proportions, whether it does so depends on the length and circumstances of the deprivation. *See Willis v. Bell*, 726 F.Supp. 1118, 1122-23 (N.D. Ill. 1989), *modified on other grounds*, 999 F.2d 284 (7th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994). The complete lack of any factual allegations in the complaint means that the court was not provided with sufficient information to determine whether a violation had occurred. In fact, the Ninth Circuit has recently held that a prisoner's failure "to allege facts establishing the deprivation of adequate food" falls short of a constitutional violation. *May v. Baldwin*, 109 F.3d 557, 566 (9th Cir. 1997). Certainly respondent has failed to come forward with factual allegations in response to petitioners' claim to qualified immunity. His failure must redound to his detriment.

Finally, as to respondent's claim that he was incarcerated under a false name, petitioners have found no cases, and none were cited by any party or the courts below, which support the proposition that it is a violation of clearly established law to hold a pre-trial detainee under a false name. Respondent has made no allegation that he was denied access to counsel in violation of the Sixth Amendment or that his being held under a false name otherwise impinged upon rights of a constitutional scope.

Thus, the Ninth Circuit's failure to analyze each claim raised by respondent, as required by *Wilson v. Seiter* and *Hoptowit*, resulted in its erroneous determination that the law with respect to each claim was clearly established and that respondent had properly asserted a constitutional violation with respect to each claim. Its decision is in conflict with qualified immunity jurisprudence, with the case law defining Eighth Amendment analysis and with the case law relating to the subject matter of respondent's specific claims.

B. The Ninth Circuit's Failure to Apply the Proper Qualified Immunity Analysis Allowed Respondent's Claims to Stand Despite the Fact That Respondent Has Not Alleged Specific Wrongful Conduct by the Petitioners.

Although the Ninth Circuit's analysis of the first part of the qualified immunity test is minimal at best, its "analysis" of the second part of the test—whether the official defendant could reasonably have believed that his conduct was lawful under the circumstances—is non-existent. The Ninth Circuit did not weigh the allegations in respondent's complaint against this standard at all. Its decision accordingly allows the respondent to survive a motion to dismiss on qualified immunity grounds simply by alleging a violation of a constitutional right, without *any* attention to the reasonableness of the individual petitioners' alleged actions. This

result is in direct conflict with the explicit requirements of this Court's qualified immunity cases.[9]

The Ninth Circuit's failure to reach the second part of the test had significant and wholly unwarranted consequences in this case. Had the Ninth Circuit considered whether the individual petitioners could reasonably have believed that their actions were lawful, it would, of necessity, have had to consider the complaint's allegations concerning those petitioners. In doing so, the Ninth Circuit could not have overlooked the fact that, as to three of the four petitioners (Waters, Gruden and Lawn), the complaint contains *no* allegations that they took any actions at all with respect to the purported constitutional violations in which respondent's remaining claims are based. In fact, as the district court essentially stated, the complaint neither alleges that Waters, Gruden nor Lawn participated in the allegedly wrongful acts, nor that they directed them. Appendix at 52a.[10] By allowing respondent's claims to stand in the absence of such allegations, the Ninth Circuit has established a precedent which conflicts not only with the very purposes of qualified immunity but also with well-established case law providing that *Bivens* liability cannot be predicated upon respondeat superior or other theories of vicarious liability and, instead, requires direct personal involvement in the allegedly wrongful acts. *See Taylor v.*

---

[9] In *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1097 (1995), the Ninth Circuit stated in a footnote that it was not always necessary to address the second part of the test. 27 F.3d at 1449 n.19. Assuming for a moment that *Chew* is correct on this point, the Ninth Circuit's failure to consider the allegations (or absence thereof) regarding specific wrongful conduct by specific defendants in this case resulted in the erroneous denial of petitioners' motion to dismiss.

[10] The complaint alleges that petitioners Waters, Gruden and Lawn "participated in the decision to kidnap Plaintiff Alvarez in violation of international law." (Complaint, ¶¶ 7, 8, 9.) However, respondent's claims regarding his kidnapping in Mexico are not at issue here. Appendix at 44a-51a.

List, 880 F.2d 1040, 1045 (9th Cir. 1989); *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 681 (9th Cir. 1984).

The Ninth Circuit's decision is also in conflict with this Court's direction that a claim cannot go forward if respondent has failed to allege facts that establish a constitutional violation by petitioners. *See Siegert v. Gilley*, 500 U.S. at 232. Plainly, a complaint which does not allege any acts or personal involvement in any acts on the part of defendants cannot allege that those defendants committed constitutional violations. Under the approach adopted by the Ninth Circuit in this case, *any* government official in a supervisory position could be sued and subjected to discovery despite the total absence of allegations that he or she participated in any way in the conduct in question. Not only would this result chill action by government officials, it would chill government service itself.

Even as to petitioner Berellez, the complaint alleges only that he and other DEA agents participated in the interrogation and threatened respondent. Complaint, ¶¶ 19, 51. It does not contain any allegations of specific conduct by Berellez, nor does it allege any specific involvement by Berellez in the alleged deprivation of food or incarceration under a false name. Allowing a case to go forward against a government official when the plaintiff fails to allege any personal involvement by that official directly contravenes the very purpose of the qualified immunity doctrine. This is particularly so where, as here, the respondent's allegations of mistreatment have been litigated in his prior criminal proceeding and found to be "not worthy of belief." *United States v. Caro-Quintero*, 745 F. Supp. at 605.[11]

---

[1] Oddly, the Ninth Circuit gave no weight to Judge Rafeedie's findings as they impact petitioners, while at the same time holding that his findings in respondent's "criminal action bars Alvarez-Machain from pressing the issue [of extraterritorial application of the Fifth Amendment] again in the civil arena." Appendix at 10a-11a.

The Ninth Circuit's decision is also in direct conflict with decisions of other circuits which hold that a plaintiff cannot survive a motion to dismiss on qualified immunity grounds if his complaint contains generalized pleading which fails to allege specific wrongdoing by particular defendants. *See Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995); *Wicks v. Mississippi State Employment Services*, 41 F.3d 991, 995 (5th Cir.), *cert. denied*, 115 S. Ct. 2555 (1995). The approach adopted by the Ninth Circuit in this case makes "[t]he promise of early exit from a lawsuit offered by qualified immunity . . . an empty promise." *Veney*, 70 F.3d at 922.

II. THE LEGAL STANDARD APPLICABLE TO A MOTION TO DISMISS ON QUALIFIED IMMUNITY GROUNDS IS AN IMPORTANT ISSUE WHICH THIS COURT SHOULD DECIDE.

Qualified immunity entitles its possessor to avoid the burdens of litigation," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), including the "broad-ranging discovery" that can be "peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817. For this reason, this Court's decisions have emphasized that "qualified immunity questions should be resolved at the *earliest possible* stage of a litigation." *Anderson v. Creighton*, 483 U.S. at 646 n.6 (emphasis added).

A motion to dismiss is the earliest vehicle by which defendants may dispose of claims against them. Such motions play a key role in providing government officials with the protection from litigation to which they are entitled under the qualified immunity doctrine. *See Behrens v. Pelletier*, 116 S.Ct. at 839-40. Defining the proper standard for analysis of such motions is, therefore, of critical importance to the effectuation of the doctrine.

In this case, petitioners sought to dismiss the complaint on qualified immunity grounds because the respondent had not alleged any actions personally taken by petitioners

which violated his constitutional rights. After searching respondent's complaint for allegations of potential violations, the district court stated that

> Except as these claims identify Berellez, the involvement of the four moving defendants is unclear, rendering it difficult to determine whether they personally participated in or directed the conduct at issue, or knew of the conduct and failed to prevent it.

Appendix at 52a. Despite the wholly conclusory nature of the allegations concerning petitioners' conduct, the district court denied the motion to dismiss, and the denial was affirmed by the Ninth Circuit. The district court reached this conclusion notwithstanding its acknowledgment of the paucity of factual allegations in the complaint. Instead, the court wrongly concluded that because "the pleading requirements of Fed. R. Civ. P. 8 are minimal . . . Alvarez may be able to prove that [respondents] violated his clearly established constitutional rights and will be given the opportunity to obtain such proof." Appendix at 52a.

The district court's analysis is precisely backwards, placing as it does the discovery cart before the immunity horse. If conclusory allegations such as those made by respondent here are enough to force a government official to bear all the burdens of litigation, the protection against the burdens of the discovery process, which the qualified immunity doctrine is supposed to offer, will mean very little.

Some circuits have addressed this problem by imposing a "heightened pleading standard" in qualified immunity cases—that is, requiring the plaintiff to plead specific facts establishing that the qualified immunity doctrine does not apply in order to survive a motion to dismiss.[12] *See*

[12] Petitioners did not ask the court below to impose a heightened pleading standard in so many words. However, at every stage of this litigation petitioners have argued that the complaint failed

Wicks v. Mississippi State Employment Services, 41 F.3d 991 (5th Cir.), *cert. denied*, 115 S. Ct. 2555 (1995); *Dunbar Corp. v. Lindsey*, 905 F.2d 754 (4th Cir. 1990); *Veney v. Hogan*, 70 F.3d 917 (6th Cir. 1995); *Kartseva v. Department of State*, 37 F.3d 1524 (D.C. Cir. 1994); *Crawford-El v. Britton*, 93 F.3d 813 (D.C. Cir. 1996) (*en banc*), *petition for cert. filed*, No. 96-827 (Nov. 25, 1996). Other circuits, including the Ninth Circuit, have refused to apply the heightened pleading standard in all qualified immunity cases, holding instead that it only applies when the defendant's subjective intent is an element of the alleged constitutional violation. *See Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457 (9th Cir. 1994); *Triad Associates, Inc. v. Robinson*, 10 F.3d 492 (7th Cir. 1993). This Court has not yet addressed this question. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), which involved the question of whether a heightened pleading standard should apply in municipal liability suits under 42 U.S.C. § 1983, this Court expressly noted that it had "no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving government officials." 507 U.S. at 166-67.

The issue of whether conclusory allegations such as those made by respondent in this case are sufficient to defeat a motion to dismiss and thereby deny government officials the full protection of the qualified immunity doctrine is of key importance both to official defendants and to courts faced with such motions. Petitioners respectfully submit that this Court should take jurisdiction of this case to resolve this issue.

---

specifically to allege unlawful actions personally taken by defendants. Therefore, the issue of the level of factual specificity which must be pled to survive a motion to dismiss on qualified immunity grounds was clearly raised.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL L. MARTINEZ
Counsel of Record
GLORIA B. SOLOMON
HOLLAND & KNIGHT LLP
2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037
(202) 955-3000
Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-55464
D.C. No. CV 93-04072-JGD

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellee,
v.

UNITED STATES OF AMERICA;
ANTONIO GARATE-BUSTAMANTE;
FRANCISCO SOSA,
Defendants.
and

HECTOR BERELLEZ; BILL WATERS;
PETE GRUDEN; JACK LAWN,
Defendants-Appellants.

No. 95-55768
D.C. No. CV 93-04072-JGD

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellee,
v.

UNITED STATES OF AMERICA, *et al.*,
Defendant-Appellant.

No. 95-56121
D.C. No. CV 93-04072-JGD

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellant,
v.

UNITED STATES OF AMERICA,
Defendant,
and

FRANCISCO SOSA; ANTONIO GARATE-BUSTAMANTE,
Defendants-Appellees.

Appeals from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
July 8, 1996—Portland, Oregon

Filed September 24, 1996
Amended February 19, 1997

Before: Alfred T. Goodwin and Mary M. Schroeder,
Circuit Judges, and Samuel P. King*, District Judge.

Opinion by Judge Goodwin

---

* Honorable Samuel P. King, United States District Judge for the District of Hawaii, sitting by designation.

AMENDED OPINION

GOODWIN, Circuit Judge:

In April 1990 the United States Drug Enforcement Agency (DEA) orchestrated the abduction and torture of Dr. Alvarez-Machain, a Mexican doctor, and transported him to the United States for prosecution for the murder of a DEA agent in Mexico. The criminal case ended when the district court granted a judgment of acquittal.

Alvarez-Machain returned to Mexico and filed this civil action against the United States and its agents under 42 U.S.C. § 1983 and other federal statutes. His claims included the violation of constitutional rights as well as ten torts, ranging from torture to false imprisonment. Defendants moved to dismiss the complaint, and the district court granted the motion in part and denied it in part.

The court dismissed the constitutional claims that were based upon activities occurring in Mexico. The court also dismissed a claim brought under the Torture Victim Protection Act (TVPA). The court refused to dismiss the tort claims as barred by the statute of limitations, and denied the motion based upon the defense of qualified immunity asserted by defendants accused of wrongful conduct within the United States. We affirm the district court in its judgment with respect to all claims other than the TVPA claim. The district court held that it could not apply the TVPA to defendant's actions because the TVPA was enacted subsequent to the pertinent events. Because we hold that application of the TVPA to past acts would not have a retroactive effect, we reverse the district court on this ruling.

FACTS

On April 2, 1990, a team of men alleged to be hired by DEA agents working in Mexico, abducted Dr. Alvarez-Machain from his office in Guadalajara. They blindfolded him, transported him to an unknown location, and pro-

ceeded to beat him and subject him to electrical shocks. His kidnappers injected him with unknown chemical substances causing nausea and dizziness, denied him food and water, and forced him to lie face down on the floor for a long period of time. His life was repeatedly threatened, as well as the safety of his family. After enduring this torment for several hours, he was delivered into the hands of the DEA in El Paso, Texas.

Defendant Antonio Garate-Bustamante coordinated and led the activities in Mexico, and defendant Francisco Sosa participated in the events. Both were working as the paid agents of the DEA, who undertook to bring Alvarez-Machain to the United States in order to prosecute him for his alleged role in the murder of DEA agent Enrique Camarena.

Once in El Paso, defendant Garate-Bustamante and several DEA agents interrogated Alvarez-Machain. The DEA agents threatened Alvarez-Machain during the interrogation, denied him food and adequate medical attention, and at one point forced him to stand naked and be photographed. In El Paso, the DEA processed Alvarez-Machain under an assumed name or names, despite knowing his true identity, frustrating efforts by his family members and the Mexican government to learn his whereabouts.

On April 10, 1990, Alvarez-Machain was transferred to Los Angeles and arraigned on charges of murder before United States District Judge Edward Rafeedie. Subsequently, Judge Rafeedie dismissed the charges, concluding that the court lacked jurisdiction over Alvarez-Machain because his abduction violated the extradition treaty between the United States and Mexico. *United States v. Caro-Quintero,* 745 F. Supp. 599, 601 (C.D. Cal. 1990), *aff'd sub nom United States v. Alvarez-Machain,* 946 F.2d 1466 (9th Cir. 1991). The Supreme Court reversed the dismissal, however, and Alvarez-Machain was forced to stand trial. *United States v. Alvarez-Machain,* 504 U.S.

655 (1992). As noted, the prosecution ended with a judgment of acquittal on December 14, 1992. After the acquittal, Judge Rafeedie revealed that the government had withheld potentially exculpatory evidence from the defense, in addition to failing to take him promptly before a magistrate after he reached United States territory under arrest.

In addition to the cases consolidated in this appeal, Alvarez-Machain filed an administrative claim against the United States under the Federal Tort Claims Act (FCTA), 28 U.S.C. § 2401(b). He added the United States as a defendant in January, 1994, after the six-month waiting period required by statute had expired. Against all defendants he alleged claims for kidnapping; torture, cruel and inhuman and degrading treatment or punishment; prolonged arbitrary detention; assault and battery; false imprisonment; intentional infliction of emotion distress; false arrest; negligent employment of public employees and agents; negligent infliction of emotional distress; and violations of the Fourth, Fifth and Eighth Amendments to the United States Constitution. Against defendants Garate-Bustamante and Sosa, Alvarez-Machain also alleged a claim under the Torture Victim Protection Act (TVPA).[1]

In dismissing the constitutional claims arising out of conduct in Mexico, the district court held that the United States Constitution does not protect Mexican nationals in Mexico from wrongs committed against them by United States government agents engaged in extraterritorial law enforcement. The district court allowed the action to proceed on conduct by DEA agents acting within the United States, however, holding that the alleged conduct, if proved, clearly violated established constitutional rights. Accordingly, as noted, the DEA agents who participated in the El Paso activities were denied dismissal on qualified immunity grounds, and they have appealed that ruling.

---

[1] Codified in the statutory notes to 28 U.S.C. § 1350.

The court denied Defendants Garate-Bustamante's and Sosa's motions for dismissal as to all but the TVPA claim, holding that more discovery was necessary to determine the exact relationship between the Mexican defendants and the United States before a determination could be made whether the defense of qualified immunity was available, or whether the United States could be substituted as the defendant on the tort claims based on their conduct in the United States. As for the TVPA, the district court declined to apply it to claims of torture occurring prior to the enactment of the statute, and Alvarez-Machain appeals that ruling.

Finally, with regard to the United States, the district court denied its motion to dismiss the tort claims as barred by the statute of limitations. The court recognized that the statute of limitations raised a potential problem for Alvarez-Machain, but believed more discovery might reveal a basis for equitable tolling of the statute because of the lengthy duration of the plaintiff's incarceration, including his being held incommunicado, and otherwise prevented from timely protecting his civil rights while defending the murder charges against him.

These rulings are the subject of the present interlocutory appeals.[2]

---

[2] In no. 95-55768, the United States appeals the order denying its motion to dismiss the Federal Tort Claims Act causes of action.

In no. 95-55464, the DEA defendants appeal the order denying their motion to dismiss the contitutional claims for actions taken in the United States.

In no. 95-56121, Alvarez-Machain appeals the dismissal of his constitutional claims for actions taken in Mexico, and the dismissal of his claims under the TVPA.

Garate-Bustamante and Sosa also appealed the orders pertaining to their motions for dismissal based on qualified immunity and their motions for substitution of the United States as defendant in the tort actions. These appeals were dismissed by this court pursuant to *Johnson v. Jones*, 115 S. Ct. 2151 (1995). Nos. 95-55467 and 95-55469.

DISCUSSION

I. *Statute of Limitations—No. 95-55768*

The government argues that Alvarez-Machain's FTCA claims are barred by the statute of limitations because he failed to file an administrative claim until July 1993—three years after his alleged abduction and torture.

The FTCA provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . .

28 U.S.C. § 2401(b). The key question here is the date of accrual for Alvarez-Machain's claims.

Generally a claim accrues when the plaintiff knows, or in the exercise of reasonable diligence should know, of both the injury and its cause. *Dyniewicz v. United States*, 742 F.2d 484, 486 (9th Cir. 1984). Under our case law, all the torts alleged by Alvarez-Machain accrued more than three years before he filed his administrative claim and so normally would be barred.

In this case, however, Alvarez-Machain's claims of false arrest, false imprisonment, and negligent infliction of emotional distress are not barred by the statute because they did not accrue until after his acquittal in his criminal trial. In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that those § 1983 claims of state prisoners which implicated the validity of their convictions would not accrue until their conviction was reversed. Here, Alvarez-Machain alleges the torts of false arrest, false imprisonment, and negligent infliction of emotional distress. If these claims had been litigated while his criminal trial was pending, their resolution would have implicated his guilt or innocence on the charges against him. *See Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996) ("There

is no question that Heck bars [the plaintiff's] claims that defendants lacked probable cause to arrest him and brought unfounded criminal charges against him."). Under the reasoning of *Heck*, therefore, Alvarez-Machain's claims for false arrest, false imprisonment, and negligent infliction of emotional distress did not accrue in this case until he was acquitted.

Alvarez-Machain's other tort claims do not necessarily implicate the validity of his criminal charges. Nonetheless, this is an appropriate case for the application of the doctrine of equitable tolling of the statute of limitations. In addition to the obvious reasons for its application to claims that could not have been brought prior to his acquittal, reasons of judicial economy counsel against splitting causes of action, and reasons of common decency counsel against using governmental immunity as a sword instead of a shield in this case.

Equitable tolling is available in suits against the United States absent evidence that Congress intended the contrary. *Irwin v. Dept. of Veteran Affairs*, 498 U.S. 89, 95-96 (1990). Nothing in the FTCA indicates that Congress intended for equitable tolling not to apply. Hence, equitable tolling is available for FTCA claims in the appropriate circumstances; and the circumstances of this case are highly appropriate for tolling.

> Federal courts have applied the doctrine of equitable tolling in two generally distinct kinds of situations. In the first, the plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant. In the second, extraordinary circumstances beyond plaintiffs' control made it impossible to file the claims on time.

Seattle Audubon Soc. v. Robertson, 931 F.2d 590, 595 (9th Cir. 1991), *rev. on other grounds*, 503 U.S. 429 (1992). *See also Capital Tracing, Inc. v. United States*,

63 F.3d 859 (9th Cir. 1995) (tolling the statute due to a lack of clarity in the law).

Here, the circumstances of Alvarez-Machain's abduction and subsequent trial warrant the equitable tolling of the statute of limitations. Alvarez-Machain was incarcerated for over two years, facing criminal charges of the highest gravity in a foreign country whose language he did not understand. His life was at stake, and his case involved numerous, complex issues of first impression—several of which were were ultimately decided by the United States Supreme Court. *See, e.g., United States v. Alvarez-Machain,* 504 U.S. 655 (1992); *United States v. Verdugo-Urquidez,* 494 U.S. 259 (1990). Moreover, as discussed, had he filed an administrative claim prior to obtaining an acquittal, many of his claims would have been dismissed because they necessarily implicated the validity of his criminal charges. *Heck v. Humphrey,* 512 U.S. 477. Looking at the totality of these circumstances, we conclude that Alvarez-Machain's case constitutes that rare situation where equitable tolling is demanded by sound legal principles as well as interests of justice. We affirm the denial of the government's motion based on the statute of limitations.

II. *DEA Agents Qualified Immunity*

Pre-trial detainees possess a clearly established right to be free from punishment. *Bell v. Wolfish,* 441 U.S. 520, 534-37 (1979). This right is located in the due process clause of the Fifth Amendment, but we borrow from Eighth Amendment principles in determining the care to be afforded pretrial detainees. *Jones v. Johnson,* 781 F.2d 769, 771 (9th Cir. 1986). The Eighth Amendment "proscribes . . . sanctions that are 'so totally without penological justification that it results in the gratuitous infliction of suffering.'" *Hoptowit v. Ray,* 682 F.2d 1237, 1246 (9th Cir. 1982) (quoting *Gregg v. Georgia,* 428 U.S. 153, 183 (1976)). Convicted prisoners and pre-

trial detainees are also entitled to "adequate food, clothing, shelter, sanitation, medical care, and personal safety." *Id.*

The complaint here reveals that the DEA agent defendants "threatened" Alvarez-Machain during an interrogation session in El Paso on April 3, 1990; withheld food throughout the interrogation; incarcerated him under a false name, making it impossible for the United States government to respond to inquiries about his whereabouts from his family or the Mexican government; and denied him adequate medical attention. Each of these allegations, if proven, served to create an atmosphere of fear and isolation, imposing "gratuitous suffering" in violation of *Hoptowit*. Further, the deprivation of food and medical attention alone could serve to sustain a claim under the due process clause. *Id.* Accordingly, the district court did not err in denying defendants' motion to dismiss these claims.

III. *Extraterritorial Application of the Fifth Amendment*

Alvarez-Machain argues that the district court erred in holding that the Fifth Amendment due process clause does not protect aliens from actions taken by the United States abroad. We find it unnecessary to reach this issue. The issue is precluded because, under the instruction of the Supreme Court, in his criminal prosecution, we have already held that the actions taken by United States government agents or their employees against Alvarez-Machain in Mexico did not violate due process. *United States v. Alvarez-Machain,* 971 F.2d 310 (9th Cir. 1992) (on remand from the United States Supreme Court). There we stated, "Alvarez-Machain's main alternative argument is that the circumstances of his kidnapping were so shocking that the abduction constituted a denial of due process. This contention similarly is not supported by the district court's findings." *Id.* at 311. This adverse finding in the criminal action bars Alvarez-Machain from pressing the

issue again in the civil arena. *Matthews v. Macanas*, 990 F.2d 467 (9th Cir. 1993).

IV. *Torture Victim Protection Act*

Alvarez-Machain's complaint also included a claim against defendants Garate-Bustamante and Sosa under the Torture Victim Protection Act, signed into law on March 12, 1992. The law provides in pertinent part: "An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; . . ." TVPA § 2 (a), codified in the statutory notes to 28 U.S.C. § 1350.

The district court dismissed the TVPA claim, holding that application of the TVPA to the allegations here would have an improper, retroactive effect. Alvarez-Machain argues that application here would not have a retroactive effect because defendants had a legal duty to refrain from torture even prior to the TVPA's passage. The two other district courts to have considered the issue agreed with the argument advanced by Alvarez-Machain, *see Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass 1995); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996), but it appears to be an issue of first impression for the Circuit courts.

The Torture Victim Protection Act is silent with regard to whether Congress intended for it to apply retroactively. Absent clear Congressional intent, there exists a strong presumption against retroactivity. However, not every application of a statute to events occurring before its enactment constitutes a "retroactive application." An application does not have a retroactive effect unless "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraff v. U.S.I. Film Products*, 511 U.S. 244, 280 (1994). Courts regularly apply new statutes to past events when the intervening statute authorizes or affects the propriety

of prospective relief; where the intervening statute confers or ousts jurisdiction; or when the intervening statute merely changes the procedural landscape. *Id.* at 1501-1502.

The Torture Victim Protection Act does not impose new duties or liabilities on defendants. Torture has long been condemned and prohibited by international law. *See, e.g., Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980). Further, aliens have had the right to adjudicate torture claims in our federal courts since the passage of the Alien Tort Claim Act (ATCA) in 1789.[3]

Defendants attempt to distinguish the ATCA from the TVPA in three ways, but none warrants a holding that application of the TVPA to defendants' conduct would have a retroactive effect.

First, defendants argue that the ATCA confers jurisdiction on federal courts to hear international law claims, but does not create a substantive, federal right like the TVPA. Defendants err in their description of the ATCA; we have previously held that the ATCA has a substantive as well as a jurisdictional component. *In re Estate of Ferdinand Marcos, Human Rights Lit.,* 25 F.3d 1467 (9th Cir. 1994) (*Marcos II*), *cert. denied* 115 S.Ct. 934 (1995). *Accord Xuncax,* 886 F. Supp. 162; *Cabiri,* 921 F. Supp. 1189. In *Marcos II* we stated,

> in contrast to section 1331 "which requires that an action 'arise under' the laws of the United States, section 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action." *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 779 (D.C.Cir. 1984) (Edwards, J., concurring), *cert. denied,* 470 U.S. 1003 (1985).

---

[3] The ATCA provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

Id. at 1475. The court further explained, "International law does not require any particular reaction to violations of law. . . . Whether and how the United States wished to react to such violations are domestic questions. [Internal quotation marks and citation omitted.]" *Id. See also Filartiga*, 630 F.2d 876 (holding that claims of torture could be adjudicated under the ATCA because torture constituted a violation of international law).

Our conclusion in *Marcos II* is supported by the legislative history of the TVPA.

> The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), which permits Federal district courts to hear claims by aliens for torts committed "in violation of the law of nations." . . . Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing.

H.R. Rep. (Judiciary Committee) No. 367(I), 102nd Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86; *see also* S. Rep. (Judiciary Committee) No. 249, 102nd Cong., 1st Sess. (1991).

Second, defendants argue that TVPA expands the class of plaintiffs able to bring claims for torture, and thus creates new duties. Where the ATCA allows only aliens to bring actions in U.S. courts for extraterritorial torture, the TVPA allows aliens *and* citizens to bring such claims. The defendants' distinction is without significance, however, because citizens have always been able to bring claims for extraterritorial torture in state courts under the transitory tort doctrine. The TVPA merely allows citizens now to bring those claims in federal court as well. There is no increase in duties or liabilities, and thus no retroactive effect.

Third, defendants argue that the TVPA increases liabilities by exposing a new class of defendants to personal liability. Under the ATCA, defendants maintain, individuals would not be held personally liable for acts of torture if, while acting under the color of foreign authority, they were also working within the scope of employment for the United States. In such cases, the United States would be substituted as the defendant, and the individuals would escape personal liability. Because no substitution is allowed under the TVPA, defendants claim they are newly burdened with liability they did not have before 1992.

Defendants postulate a set of circumstances that are too remote to affect our retroactivity analysis. If courts were required to give weight to every hypothetical suggestion advanced by litigants, few statutes would survive the *Landgraff* test.

V. *Conclusion*

The judgment of the district court is AFFIRMED insofar as it dismissed the constitutional claims arising out of harms suffered by the plaintiff in Mexico; we AFFIRM the denial of the government's defense based on the statute of limitations; and the denials of motions to dismiss on the basis of qualified immunity. We REVERSE the ruling that the TVPA claims were barred because application of the statute to events taking place prior to its enactment would have a retroactive effect. We REMAND the case to the district court for further proceedings.

The plaintiff is entitled to costs on appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-55464
D.C. No. CV 93-04072-JGD

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA;
ANTONIO GARATE-BUSTAMANTE;
FRANCISCO SOSA,
Defendants,

and

HECTOR BERELLEZ; BILL WATERS;
PETE GRUDEN; JACK LAWN,
Defendants-Appellants.

No. 95-55768
DC. No. CV 93-04072-JGD

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendant-Appellant.

No. 95-56121
D.C. No. CV 93-04072-JGD

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellant,
v.

UNITED STATES OF AMERICA,
Defendant,
and

FRANCISCO SOSA; ANTONIO GARATE-BUSTAMANTE,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
July 8, 1996—Portland, Oregon

Filed September 25, 1996

Before: Alfred T. Goodwin and Mary M. Schroeder,
Circuit Judges, and Samuel P. King,* District Judge.

Opinion by Judge Goodwin

---

* Honorable Samuel P. King, United States District Judge for the District of Hawaii, sitting by designation.

OPINION

GOODWIN, Circuit Judge:

In April 1990 the United States Drug Enforcement Agency (DEA) orchestrated the abduction and torture of Dr. Alvarez-Machain, a Mexican doctor, and transported him to the United States for prosecution for the murder of a DEA agent in Mexico. The criminal case ended when the district court granted a judgment of acquittal.

Alvarez-Machain returned to Mexico and filed this civil action against the United States and its agents under 42 U.S.C. § 1983 and other federal statutes. His claims included the violation of constitutional rights as well as ten torts, ranging from torture to false imprisonment. Defendants moved to dismiss the complaint, and the district court granted the motion in part and denied it in part.

The court dismissed the constitutional claims that were based upon activities occurring in Mexico. The court also dismissed a claim brought under the Torture Victim Protection Act (TVPA). The court refused to dismiss the tort claims as barred by the statute of limitations, and denied the motion based upon the defense of qualified immunity asserted by defendants accused of wrongful conduct within the United States. We affirm the district court in its judgment with respect to all claims other than the TVPA claim. The district court held that it could not apply the TVPA to defendant's actions because the TVPA was enacted subsequent to the pertinent events. Because we hold that application of the TVPA to past acts would not have a retroactive effect, we reverse the district court on this ruling.

FACTS

On April 2, 1990, a team of men alleged to be hired by DEA agents working in Mexico, abducted Dr. Alvarez-Machain from his office in Guadalajara. They blindfolded him, transported him to an unknown location, and pro-

ceeded to beat him and subject him to electrical shocks. His kidnappers injected him with unknown chemical substances causing nausea and dizziness, denied him food and water, and forced him to lie face down on the floor for a long period of time. His life was repeatedly threatened, as well as the safety of this family. After enduring this torment for several hours, he was delivered into the hands of the DEA in El Paso, Texas.

Defendant Antonio Garate-Bustamante coordinated and led the activities in Mexico, and defendant Francisco Sosa participated in the events. Both were working as paid agents of the DEA, who undertook to bring Alvarez-Machain to the United States in order to prosecute him for his alleged role in the murder of DEA agent Enrique Camarena.

Once in El Paso, defendant Garate-Bustamante and several DEA agents interrogated Alvarez-Machain. The DEA agents threatened Alvarez-Machain during the interrogation, denied him food and adequate medical attention, and at one point forced him to stand naked and be photographed. In El Paso, the DEA processed Alvarez-Machain under an assumed name or names, despite knowing his true identity, frustrating efforts by his family members and the Mexican government to learn about his whereabouts.

On April 10, 1990, Alvarez-Machain was transferred to Los Angeles and arraigned on charges of murder before United States District Judge Edward Rafeedie. Subsequently, Judge Rafeedie dismissed the charges, concluding that the court lacked jurisdiction over Alvarez-Machain because his abduction violated the extradition treaty between the United States and Mexico. *United States v. Caro-Quintero,* 745 F. Supp. 599, 601 (C.D. Cal. 1990), *aff'd sub nom United States v. Alvarez-Machain,* 946 F.2d 1466 (9th Cir. 1991). The Supreme Court reversed the decision, however, and Alvarez-Machain was forced to

stand trial. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). As noted, the prosecution ended with a judgment of acquittal on December 14, 1992. After the acquittal, Judge Rafeedie revealed that the government had withheld potentially exculpatory evidence from the defense, in addition to failing to take him promptly before a magistrate after he reached United States territory under arrest.

In addition to the cases consolidated in this appeal, Alvarez-Machain filed an administrative claim against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2401(b). He added the United States as a defendant in January, 1994, after the six-month waiting period required by statute had expired. Against all defendants he alleged claims for kidnapping; torture; cruel and inhuman and degrading treatment or punishment; prolonged arbitrary detention; assault and battery; false imprisonment; intentional infliction of emotional distress; false arrest; negligent employment of public employees and agents; negligent infliction of emotional distress; and violations of the Fourth, Fifth and Eighth Amendments to the United States Constitution. Against defendants Garate-Bustamante and Sosa, Alvarez-Machain also alleged a claim under the Torture Victim Protection Act (TVPA).[1]

In dismissing the constitutional claims arising out of conduct in Mexico, the district court held that the United States Constitution does not protect Mexican nationals in Mexico from wrongs committed against them by United States government agents engaged in extraterritorial law enforcement. The district court allowed the action to proceed on conduct by DEA agents acting within the United States, however, holding that the alleged conduct, if proved, clearly violated established constitutional rights. Accordingly, as noted, the DEA agents who participated in the El Paso activities were denied dismissal on quali-

[1] Codified in the statutory notes to 28 U.S.C. § 1350.

fied immunity grounds, and they have appealed that ruling.

The court denied Defendants Garate-Bustamante's and Sosa's motions for dismissal as to all but the TVPA claim, holding that more discovery was necessary to determine the exact relationship between the Mexican defendants and the United States before a determination could be made as to whether the defense of qualified immunity was available, or whether the United States could be substituted as the defendant on the tort claims based on their conduct in the United States. As for the TVPA, the district court declined to apply it to claims of torture occurring prior to the enactment of the statute, and Alvarez-Machain appeals that ruling.

Finally, with regard to the United States, the district court denied its motion to dismiss the tort claims as barred by the statute of limitations. The court recognized that the statute of limitations raised a potential problem for Alvarez-Machain, but believed more discovery might reveal a basis for equitable tolling of the statute because of the lengthy duration of the plaintiff's incarceration, including his being held incommunicado, and otherwise prevented from timely protecting his civil rights while defending the murder charges against him.

These rulings are the subject of the present interlocutory appeals.[2]

---

[2] In no. 95-55768, the United States appeals the order denying its motion to dismiss the Federal Tort Claims Act causes of action.

In no. 95-55464, the DEA defendants appeal the order denying their motion to dismiss the constitutional claims for actions taken in the United States.

In no. 95-56121, Alvarez-Machain appeals the dismissal of his constitutional claims for actions taken in Mexico, and the dismissal of his claims under the TVPA.

Garate-Bustamante and Sosa also appealed the orders pertaining to their motions for dismissal based on qualified immunity and their motions for substitution of the United States as defendant

DISCUSSION

I. *Statute of Limitations—No. 95-55768*

The government argues that Alvarez-Machain's FTCA claims are barred by the statute of limitations because he failed to file an administrative claim until July 1993—three years after his alleged abduction and torture.

The FTCA provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . . .

28 U.S.C. § 2401(b). The key question here is the date of accrual for Alvarez-Machain's claims.

Generally a claim accrues when the plaintiff knows, or in the exercise of reasonable diligence should know, of both the injury and its cause. *Dyniewicz v. United States*, 742 F.2d 484, 486 (9th Cir. 1984). Here, Alvarez-Machain did not have a sufficient basis to bring his claims of false imprisonment, negligent infliction of emotional distress, and false arrest until after he had successfully challenged the criminal charges facing him. Indeed, had he filed an administrative claim for these torts prior to obtaining his acquittal, the claim should have been dismissed as premature. *Heck v. Humphrey*, 114 S. Ct. 2364 (1994) (holding that civil claims which necessarily implicate the validity of criminal charges do not accrue until after one has succeeded in the criminal realm).

Alvarez-Machain's other tort claims do not necessarily implicate the validity of his criminal charges. Nonetheless, this is an appropriate case for the application of the doctrine of equitable tolling of the statute of limitations. In addition to the obvious reasons for its application to

---

in the tort actions. These appeals were dismissed by this court pursuant to *Johnson v. Jones*, 115 S. Ct. 2151 (1995). Nos. 95-55467 and 95-55469.

claims that could not have been brought prior to his acquittal, reasons of judicial economy counsel against splitting causes of action, and reasons of common decency counsel against using governmental immunity as a sword instead of a shield in this case.

Equitable tolling is available in suits against the United States absent evidence that Congress intended the contrary. *Irwin v. Dept. of Veteran Affairs,* 498 U.S. 89, 95-96 (1990). Nothing in the FTCA indicates that Congress intended for equitable tolling not to apply. Hence, equitable tolling is available for FTCA claims in the appropriate circumstances; and the circumstances of this case are highly appropriate for tolling.

> Federal courts have applied the doctrine of equitable tolling in two generally distinct kinds of situations. In the first, the plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant. In the second, extraordinary circumstances beyond plaintiffs' control made it impossible to file the claims on time.

Seattle Audubon Soc. v. Robertson, 931 F.2d 590, 595 (9th Cir. 1991), *rev. on other grounds,* 503 U.S. 429 (1992). *See also Capital Tracing, Inc. v. United States,* 63 F.3d 859 (9th Cir. 1995) (tolling the statute due to a lack of clarity in the law).

Here, the circumstances of Alvarez-Machain's abduction and subsequent trial warrant the equitable tolling of the statute of limitations. Alvarez-Machain was incarcerated for over two years, facing criminal charges of the highest gravity in a foreign country whose language he did not understand. His life was at stake, and his case involved numerous, complex issues of first impression—several of which were ultimately decided by the United States Supreme Court. *See, e.g., United States v. Alvarez-Machain,* 504 U.S. 655 (1992); *United States v. Verdugo-Urquidez,* 494 U.S. 259 (1990). Moreover, as discussed,

had he filed an administrative claim prior to obtaining an acquittal, many of his claims would have been dismissed because they necessarily implicated the validity of his criminal charges. *Heck v. Humphrey,* 114 S. Ct. 2364. Looking at the totality of these circumstances we conclude that Alvarez-Machain's case constitutes that rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice. We affirm the denial of the government's motion based on the statute of limitations.

II. *DEA Agents Qualified Immunity*

Pre-trial detainees possess a clearly established right to be free from punishment. *Bell v. Wolfish,* 441 U.S. 520, 534-37 (1979). This right is located in the due process clause of the Fifth Amendment, but we borrow from Eighth Amendment principles in determining the care to be afforded pre-trial detainees. *Jones v. Johnson,* 781 F.2d 769, 771 (9th Cir. 1986). The Eighth Amendment "proscribes . . . sanctions that are 'so totally without penological justification that it results in the gratuitous infliction of suffering.'" *Hoptowit v. Ray,* 682 F.2d 1237, 1246 (9th Cir. 1982) (quoting *Gregg v. Georgia,* 428 U.S. 153, 183 (1976)). Convicted prisoners and pre-trial detainees are also entitled to "adequate food, clothing, shelter, sanitation, medical care, and personal safety." *Id.*

The complaint here reveals that the DEA agent defendants "threatened" Alvarez-Machain during an interrogation session in El Paso on April 3, 1990; withheld food throughout the interrogation; incarcerated him under a false name, making it impossible for the United States government to respond to inquiries about his whereabouts from his family or the Mexican government; and denied him adequate medical attention. Each of these allegations, if proven, served to create an atmosphere of fear

and isolation, imposing "gratuitous suffering" in violation of *Hoptowit*. Further, the deprivation of food and medical attention alone could serve to sustain a claim under the due process clause. *Id.* Accordingly, the district court did not err in denying defendants' motion to dismiss these claims.

III. *Extraterritorial Application of the Fifth Amendment*

Alvarez-Machain argues that the district court erred in holding that the Fifth Amendment due process clause does not protect aliens from actions taken by the United States abroad. We find it unnecessary to reach this issue. The issue is precluded because, under the instruction of the Supreme Court, in his criminal prosecution, we have already held that the actions taken by United States government agents or their employees against Alvarez-Machain in Mexico did not violate due process. *United States v. Alvarez-Machain,* 971 F.2d 310 (9th Cir. 1992) (on remand from the United States Supreme Court). There we stated, "Alvarez-Machain's main alternative argument is that the circumstances of his kidnapping were so shocking that the abduction constituted a denial of due process. This contention similarly is not supported by the district court's findings." *Id.* at 311. This adverse finding in the criminal action bars Alvarez-Machain from pressing the issue again in the civil arena. *Matthews v. Macanas,* 990 F.2d 467 (9th Cir. 1993).

IV. *Torture Victim Protection Act*

Alvarez-Machain's complaint also included a claim against defendants Garate-Bustamante and Sosa under the Torture Victim Protection Act, signed into law on March 12, 1992. The law provides in pertinent part: "An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a ciivl action, be liable for

damages to that individual; . . . ." TVPA § 2(a), codified in the statutory notes to 28 U.S.C. § 1350.

The district court dismissed the TVPA claim, holding that application of the TVPA to the allegations here would have an improper, retroactive effect. Alvarez-Machain argues that application here would not have a retroactive effect because defendants had a legal duty to refrain from torture even prior to the TVPA's passage. The two other district courts to have considered the issue agreed with the argument advanced by Alvarez-Machain, *see Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass 1995); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996), but it appears to be an issue of first impression for the Circuit courts.

The Torture Victim Protection Act is silent with regard to whether Congress intended for it to apply retroactively. Absent clear Congressional intent, there exists a strong presumption against retroactivity. However, not every application of a statute to events occurring before its enactment constitutes a "retroactive application." An application does not have a retroactive effect unless "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraff v. U.S.I. Film Products*, 114 S.Ct. 1483, 1505 (1994). Courts regularly apply new statutes to past events when the intervening statute authorizes or affects the propriety of prospective relief; where the intervening statute confers or ousts jurisdiction; or when the intervening statute merely changes the procedural landscape. *Id.* at 1501-1502.

The Torture Victim Protection Act does not impose new duties or liabilities on defendants. Torture has long been condemned and prohibited by international law. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). Further, aliens have had the right to adjudicate

torture claims in our federal courts since the passage of the Alien Tort Claim Act (ATCA) in 1789.[3]

Defendants attempt to distinguish the ATCA from the TVPA in three ways, but none warrant a holding that application of the TVPA to defendants' conduct would have a retroactive effect.

First, defendants argue that the ATCA confers jurisdiction on federal courts to hear international law claims, but does not create a substantive, federal right like the TVPA. Defendants err in their description of the ATCA; we have previously held that the ATCA has a substantive as well as a jurisdictional component. *In re Estate of Ferdinand Marcos, Human Rights Lit.*, 25 F.3d 1467 (9th Cir. 1994) (*Marcos II*), *cert. denied* 115 S.Ct. 934 (1995). *Accord Xuncax*, 886 F. Supp. 162; *Cabiri*, 921 F. Supp. 1189. In *Marcos II* we stated,

> in contrast to section 1331 "which requires that an action 'arise under' the laws of the United States, section 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985).

Id. at 1475. The court further explained, "International law does not require any particular reaction to violations of law. . . . Whether and how the United States wished to react to such violations are domestic questions. [Internal quotation marks and citation omitted.]" *Id. See also Filartiga*, 630 F.2d 876 (holding that claims of torture could be adjudicated under the ATCA because torture constituted a violation of international law).

---

[3] The ATCA provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

Our conclusion in *Marcos II* is supported by the legislative history of the TVPA.

> The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), which permits Federal district courts to hear claims by aliens for torts committed "in violation of the law of nations." . . . Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing.

H.R. Rep. (Judiciary Committee) No. 367(I), 102nd Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86; *see also* S. Rep. (Judiciary Committee) No. 249, 102nd Cong., 1st Sess. (1991).

Second, defendants argue that the TVPA expands the class of plaintiffs able to bring claims for torture, and thus creates new duties. Where the ATCA allows only aliens to bring actions in U.S. courts for extraterritorial torture, the TVPA allows aliens *and* citizens to bring such claims. The defendants' distinction is without significance, however, because citizens have always been able to bring claims for extraterritorial torture in state courts under the transitory tort doctrine. The TVPA merely allows citizens now to bring those claims in federal court as well. There is no increase in duties or liabilities, and thus on retroactive effect.

Third, defendants argue that the TVPA increases liabilities by exposing a new class of defendants to personal liability. Under the ATCA, defendants maintain, individuals would not be held personally liable for acts of torture if, while acting under the color of foreign authority, they were also working within the scope of employment for the United States. In such cases, the United States would

be substituted as the defendant, and the individuals would escape personal liability. Because no substitution is allowed under the TVPA, defendants claim they are newly burdened with liability they did not have before 1992.

Defendants postulate a set of circumstances that are too remote to affect our retroactivity analysis. If courts were required to give weight to every hypothetical suggestion advanced by litigants, few statutes would survive the *Landgraff* test.

V. *Conclusion*

The judgment of the district court is AFFIRMED insofar as it dismissed the constitutional claims arising out of harms suffered by the plaintiff in Mexico; we AFFIRM the denial of the government's defense based on the statute of limitations; and the denials of motions to dismiss on the basis of qualified immunity. We REVERSE the ruling that the TVPA claims were barred because application of the statute to events taking place prior to its enactment would have a retroactive effect. We REMAND the case to the district court for further proceedings.

The plaintiff is entitled to costs on appeal.

APPENDIX C

[Filed Jan. 20, 1995; Entered Jan. 23, 1995]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 93-4072 JGD (JHx)

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff,

v.

UNITED STATES OF AMERICA, HECTOR BERELLEZ, BILL WATERS, PETE GRUDEN, JACK LAWN, ANTONIO GARATE-BUSTAMANTE, FRANCISCO SOSA, and five unnamed Mexican nationals currently in the federal witness protection program,

Defendants.

MEMORANDUM OPINION REGARDING THE DEFENDANTS' MOTIONS TO DISMISS AND TO SUBSTITUTE

On August 9, 1994, the following motions came on before the Court for hearing: (1) Motion to Dismiss on Behalf of the Individual Federal Defendants; (2) United States' Motion to Substitute Itself on All Claims Against Defendants Garate-Bustamante and Sosa Except the Constitutional Claims; (3) Motion to Dismiss All Claims Against Defendant Sosa; (4) Motion to Dismiss All Claims Against Defendant Garate-Bustamante; and (5) Motion to Dismiss on Behalf of the United States. After considering the written submissions of the parties and the oral arguments of counsel, the Court rules as follows.

FACTUAL BACKGROUND

In this action, plaintiff Humberto Alvarez-Machain ("Alvarez") seeks damages for injuries sustained during his abduction from Mexico by agents of the United States Drug Enforcement Agency ("DEA") and his subsequent detention pending trial in this country. The facts, as alleged in the First Amended Complaint and in published opinions pertaining to the underlying criminal action,[1] are as follows.

On February 7, 1985, DEA Special Agent Enrique Camarena was kidnapped outside the consulate of the United States in Guadalajara, Mexico. His mutilated body was found near Guadalajara one month later, along with that of Alfredo Zavala-Avelar, a Mexican pilot who had assisted Camarena in locating marijuana plantations.

The DEA attributed the killings of Camarena and Zavala to a drug trafficking cartel based in Guadalajara. An investigation resulted in the indictment of various suspects, two of whom were brought to this country to stand trial by means of covert forcible abduction from their homelands. *See United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 494 U.S. 259 (1990); *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir.), *cert. denied*, 498 U.S. 990 (1990).

Alvarez, a doctor of medicine with a specialty in obstetrics and gynecology who practiced in Guadalajara, was one of the DEA's suspects. In March 1988, Judge Edward Rafeedie of this district issued a warrant for the arrest of Alvarez as a material witness. In an indictment returned in January 1990, he was charged with conspiracy

---

[1] The Court takes judicial notice of: *United States v. Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd* 112 S. Ct. 2188 (1992), *on remand*, 971 F.2d 310 (9th Cir. 1992).

to kidnap a federal agent, felony-murder and other offenses.[2]

Between December 1989 and January 1990, the DEA unsuccessfully attempted to secure Alvarez's presence in the United States through informal negotiations with representatives of the Mexican government. When these negotiations failed, DEA Special Agent Hector Berellez, the chief of the Camarena investigation, told informant Antonio Garate-Bustamante ("Garate"), a Mexican citizen, that the DEA would pay Garate and his associates a $50,000 reward plus expenses for delivering Alvarez to the DEA in the United States. Berellez was authorized to make this offer by senior DEA officials in Los Angeles and Washington, including Deputy Director Pete Gruden.

During March 1990, Berellez had several discussions with Garate regarding the preparations of Garate's associates in Mexico. According to Berellez, the final terms of the abduction were approved by the DEA in Washington.

On the evening of April 2, 1990, Alvarez was abducted at gunpoint from his medical office in Guadalajara. During his capivity in Mexico, Alvarez claims that he was punched in the stomach, subjected to electric shocks through the soles of his shoes and twice injected with an unknown substance that made him light-headed, nauseous and dizzy. One of the abductors, a "fair-skinned man," said he was "with the DEA."

Alvarez was transported by private plane to El Paso, Texas, where he arrived on April 3. Berellez, Garate and others met Alvarez on the runway and took him into custody. The abductors remained on the plane, though one declared: "We are Mexican police. Here is your fugitive." Alvarez was taken to another location and interrogated. He recalls that he was deprived of food and

---

[2] *See* Sixth Superseding Indictment, Ex. 5 to Antonio Garate-Bustamante's Request for Judicial Notice.

subjected to verbal threats, the nature of which he does not specify.

On April 4, Alvarez complained of chest pains and received medical treatment in the El Paso area.[3] During the initial period of his incarceration, the government purposefully identified him with a pseudonym, which hindered the ability of his family, attorney and Mexican authorities to contact him. On April 10, Alvarez was transported to Los Angeles for arraignment before Judge Rafeedie.

In several diplomatic notes transmitted to the United States Department of State, the Mexican government protested Alvarez's abduction and demanded his repatriation to Mexico.

Alvarez filed a motion to dismiss the indictment for outrageous government conduct and for lack of personal jurisdiction. On August 10, 1990, after a one-day evidentiary hearing, Judge Rafeedie held that he lacked jurisdiction over Alvarez because the United States had directed his abduction from Mexico in violation of its obligations under an extradition treaty between the two countries. 745 F. Supp. 599. The Ninth Circuit affirmed. 946 F.2d 1466. However, the Supreme Court reversed on June 15, 1992, holding that the abduction did not violate the extradition treaty. 112 S. Ct. 2188. On remand, the Ninth Circuit denied Alvarez's additional arguments for dismissal. 971 F.2d 310. Alvarez remained in custody at the Metropolitan Detention Center in Los Angeles during the pendency of these appeals.[4]

---

[3] Although Alvarez alleges in his First Amended Complaint that he received inadequate medical care while detained in the United States, he has abandoned this claim. Opposition to Motion to Dismiss of the United States at 1 n.1.

[4] Judge Rafeedie initially ordered that Alvarez be detained without bail. After a third bail hearing on December 16, 1991, the Judge set bail at $10 million, a sum Alvarez did not post.

On December 14, 1992, Judge Rafeedie granted Alvarez's motion for acquittal on all charges on the ground that the government had adduced insufficient evidence to support a guilty verdict. Alvarez was released from custody more than 32 months after his abduction.

On July 9, 1993, Alvarez initiated this tort action. In the First Amended Complaint, filed January 31, 1994, Alvarez seeks damages based on the following claims: (1) kidnapping; (2) torture; (3) cruel and inhuman and degrading treatment or punishment; (4) prolonged arbitrary detention;[5] (5) violations of the Fourth, Fifth and Eighth Amendments; (6) assault and battery; (7) false imprisonment; (8) intentional infliction of emotional distress; (9) false arrest; (10) negligent employment of public employees and agents; and (11) negligent infliction of emotional distress. The legal bases for these theories of recovery are stated in the most general of terms. In addition to the Fourth, Fifth and Eighth Amendments, Alvarez invokes the Alien Tort Claims Act ("ATCA"),[6] the Torture Victim Protection Act of 1991 ("TVPA"),[7] international law, Mexican law and California law.

The defendants are the United States, DEA Special Agent Berellez, DEA Special Agent and Senior Inspector Bill Waters, former DEA Deputy Director Pete Gruden, former DEA Director Jack Lawn, DEA informant Garate, DEA informant Francisco Sosa, and five unnamed Mexican nationals who allegedly participated in the abduction and are now in the federal witness protection program. All of the individual defendants are named in their individual capacities.

---

[5] The second, third and fourth causes of action are misnumbered on the cover sheet of the First Amended Complaint.

[6] The ATCA, codified at 28 U.S.C. § 1350, is also known as the Alien Tort Statute.

[7] Pub. L. No. 102-256, 106 Stat. 78 (codified at 28 U.S.C. § 1350 Note).

No defendant has answered. The parties stipulated to several continuances to allow the instant motions to be heard concurrently.

DISCUSSION

The Court will address the motions *seriatim* in the same order as they were heard during oral argument. Garate and Sosa have filed notices of joinder in all motions except the Motion to Dismiss on Behalf of the United States.

I. Motion to Dismiss on Behalf of the Individual Federal Defendants

Defendants Berellez, Waters, Gruden and Lawn offer three arguments: (a) the Court lacks personal jurisdiction over Gruden and Lawn; (b) the United States should be substituted in as the defendant on all but the federal constitutional claims; and (c) qualified immunity shields them from liability on the constitutional claims.

A. Personal Jurisdiction

Alvarez alleges that Gruden and Lawn were the Deputy Director and Director of the DEA and "participated in the decision" to kidnap him. First Amd. Complt., paras. 8-9. Gruden and Lawn contend that the Court lacks personal jurisdiction because they do not reside in California and have insufficient contacts with the state to render them subject to suit.

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). Unless a defendant's activities in a forum are "continuous and systematic" or "substantial," in which case the state has general jurisdiction over the defendant, the state must establish specific jurisdiction based on the

quality and nature of the defendant's contacts with the state in relation to the cause of action. *Lake v. Lake*, 817 F.2d 1416, 1420-21 (9th Cir. 1987). The *Lake* court explained:

> We use a tripartite analysis in determining specific jurisdiction: (1) the nonresident defendant must purposefully direct his activities or consummate some transactions with the forum or residents thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Id. at 1421.

The plaintiff bears the burden of proving that the court has personal jurisdiction. Where, as here, a defendant's motion to dismiss is made as part of its initial response to a complaint, the plaintiff need only make a *prima facie* showing that jurisdiction exists and uncontroverted allegations in the complaint are deemed true. W. Schwarzer, A. Tashima & J. Wagstaffe, *Federal Civil Procedure Before Trial* §§ 9:113-17 (1994).

Here, the essential jurisdictional facts are undisputed. Alvarez was indicted in the Central District of California in January 1990. In April 1990 he was abducted in Mexico, held in Texas for one week, then transported to the Central District where he was detained for approximately 32 months pending trial. Gruden and Lawn do not disclaim responsibility for the decision to abduct Alvarez.

Under the first prong of the minimum contacts analysis (purposeful availment), the Supreme Court "has allowed

the exercise of jurisdiction over a defendant whose only 'contact' with the forum state is the 'purposeful direction' of a *foreign* act having *effect* in the forum state." *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986) (citing *Calder v. Jones*, 465 U.S. 783, 789 (1984)). "*Calder* thus established that personal jurisdiction can be predicated on (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state." *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993).

Alvarez persuasively invokes this "effects test." He emphasizes that Gruden and Lawn approved his abduction from Mexico for the express purpose of bringing him to trial in the Central District of California. Under these circumstances, they could reasonably anticipate being haled into court in California. *Lake*, 817 F.2d at 1422.

Under the second prong of the minimum contacts standard, Alvarez's claim plainly arises out of the defendants' forum-related activities. Alvarez seeks damages for his abduction from Mexico, his treatment in Mexico and Texas and his lengthy detention in this district.

Once a plaintiff has established minimum contacts under the first two prongs of the test, the defendant must show that "traditional notions of fair play and substantial justice" render the assertion of jurisdiction unreasonable. *Id.* at 1421-22. Seven factors must be considered: (1) the burden on the defendant; (2) existence of an alternative forum, (3) convenient and effective relief for the plaintiff, (4) the forum state's interest in adjudicating the suit, (5) efficient resolution of the controversy, (6) purposeful interjection, and (7) conflicts with sovereignty. *Id.* The Court finds that these factors weigh in favor of jurisdiction. Resolution of this action in one forum serves judicial economy and Gruden and Lawn will not

be burdened by defending from afar since they are represented by the Department of Justice. California has an interest in the litigation since Alvarez was incarcerated in this state for a lengthy period. Thus, the Court finds it has personal jurisdiction over Gruden and Lawn.

B. Substitution Under the Liability Reform Act

Berellez, Waters, Gruden and Lawn contend that the United States should be substituted in their stead with respect to the plaintiff's non-constitutional claims pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Liability Reform Act"), 28 U.S.C. § 2679. The Court agrees.

The Liability Reform Act limits the relief available to persons injured by federal government employees acting within the scope of their employment. For persons so injured, the remedy against the United States under the Federal Tort Claims Act ("FTCA") "is exclusive of any other civil action or proceeding for money damages." 28 U.S.C. § 2679(b)(1). However, two categories of civil actions are excepted: those "brought for a violation of the Constitution of the United States" and those "brought for a violation of statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(A) and (B).

Procedurally, the Liability Reform Act provides for substitution of the United States "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. § 2679(d)(1).

The Attorney General, acting through her designated representative, has certified that Berellez, Waters, Gruden and Lawn acted in the scope of federal employment at the time of the alleged acts giving rise to Alvarez's

claims. Ex. 5 to Motion to Dismiss. Alvarez does not contest this certification.

1. Claims Admittedly Subject to Substitution

Alvarez admits that his claims under the laws of California and Mexico are subject to substitution under the Liability Reform Act. The Court reads the following claims as arising solely under California or California and Mexican law: six (assault and battery), seven (false imprisonment), eight (intentional infliction of emotional distress), ten (negligent employment of public employees and agents) and eleven (negligent infliction of emotional distress). In claims one (kidnapping), two (prolonged arbitrary detention), three (cruel, inhuman and degrading treatment) and nine (false arrest), the plaintiff invokes "state, federal and international law." To the extent that these claims rest on state law, substitution is not contested.

2. Federal Statutory Claims Exception

The parties dispute whether the claims based on international law [8] are subject to substitution. Alvarez con-

---

[8] According to the Restatement (Third) of the Foreign Relations Law of the United States § 102 (1987), the sources of international law are as follows:

> (1) A rule of international law is one that has been accepted as such by the international community of states
>
> (a) in the form of customary law;
>
> (b) by international agreement; or
>
> (c) by derivation from general principles common to the major legal systems of the world.
>
> (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.
>
> (3) International agreements create law for the states parties thereto and may lead to the creation of customary international

tends that international law claims may be brought under the ATCA and therefore lie within the Liability Reform Act's exception for federal statutory claims, 28 U.S.C. § 2679(b)(2)(B). The issue, apparently, is a matter of first impression.

The ATCA provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The ATCA was enacted as part of the First Judiciary Act of 1789 but seldom has been invoked. *In re Estate of Marcos*, 978 F.2d 493, 498 (9th Cir. 1992) (*Estate I*), *cert. denied*, 113 S. Ct. 2960 (1993). Indeed, prior to 1980, the United States district courts heard only 21 lawsuits arising under the ATCA. K. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Claims Statute*, 18 N.Y.U. J. Int'l L. & Pol. 1, 4-5 n.15 (1985).

The Ninth Circuit recently held that the ATCA creates a cause of action and rejected the argument that the provision is purely jurisdictional. *In re Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994) (*Estate II*). "We thus join the Second Circuit in concluding that the [ATCA] creates a cause of action for violations of specific, universal and obligatory international human rights standards which 'confer[] fundamental rights upon all people vis-a-vis their own governments.'" *Id. at* 1475 (quoting *Filar-*

---

law when such agreements are intended for adherence by states generally and are in fact widely accepted.

(4) General principles common to major legal systems, even if not incorporated or reflected in customary law or international agreements, may be invoked as supplementary rules of international law where appropriate.

See also Siderman v. Republic of Argentina, 965 F.2d 699, 714-15 (9th Cir. 1992) (discussing the sources of customary international law), *cert. denied*, 113 S. Ct. 1812 (1993).

tiga v. Pena-Irala, 630 F.2d 876, 885-87 (2d Cir. 1980)). The court of appeals reasoned that § 1350, unlike the general federal question jurisdictional provision (28 U.S.C. § 1331), "does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action." *Id.*

A claim meets the federal statutory exception to the Liability Reform Act if the claim (1) is authorized under a federal statute and (2) is brought for a violation of that statute. 28 U.S.C. § 2679(b)(2)(B); *United States v. Smith*, 111 S. Ct. 1180, 1189 (1991). Given the Ninth Circuit's decision in *Estate II*, claims for violations of international law brought under the ATCA clearly satisfy the first condition. Whether the second condition is satisfied presents a more difficult question.

The defendants contend that the issue is controlled by *Smith*. That case involved a medical malpractice claim brought against a doctor employed by the United States Army based on injuries that occurred in Italy. The plaintiff sued under Italian law, California law, and "general American principles of law." *Id.* at 1183 and n.1. The Ninth Circuit held that the Liability Reform Act did not permit substitution of the United States because the FTCA exception for injuries sustained abroad precluded recovery against the United States. 885 F.2d 650. The court of appeals also rejected substitution under the Gonzalez Act, 10 U.S.C. § 1089, which applies in malpractice suits against military personnel, on the theory that the Act did not apply outside of the United States.

The Supreme Court reversed. It held that the Liability Reform Act applies even where there is no remedy against the government under the FTCA. *Smith*, 111 S. Ct. at 1183. Most importantly for present purposes, the Court considered and rejected the plaintiff's argument that a claim for malpractice involves a violation of the Gonzalez Act, bringing the claim under § 2679(b)(2)(B). *Id.* at

1189. The Court explained: "Nothing in the Gonzalez Act imposes any obligations or duties of care upon military physicians. Consequently, a physician allegedly committing malpractice under state or foreign law does not 'violate' the Gonzalez Act." *Id.* The Court noted that while the legislative history of the Liability Reform Act fails to disclose what causes of action Congress sought to preserve in § 2679(b)(2)(B), "a malpractice suit alleging a 'violation' of the Gonzalez Act cannot have been one of them." *Id.*

Alvarez plausibly attempts to distinguish *Smith.* He emphasizes that the purpose of the Gonzalez Act was to limit malpractice liability. *See Smith,* 111 S. Ct. at 1188 ("The Gonzalez Act functions solely to protect military medical personnel from malpractice liability; it does not create rights in favor of malpractice plaintiffs.") In contrast, the ATCA authorizes a cause of action in federal courts for violations of the law of nations; it is creative, not restrictive.

This distinction is not persuasive. It is international law, not the ATCA, that "confers fundamental rights upon all people, vis-a-vis their own governments." *Filartiga,* 630 F.2d at 885. These rights exist independent of the availability of legal venues in a given nation. *Estate II,* 25 F.3d at 1475; *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 777-78 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied,* 470 U.S. 1003 (1985). Hence, the ATCA is properly viewed "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law." *Filartiga,* 630 F.2d at 887. By comparison and as discussed below, the recently-enacted TVPA, 28 U.S.C. § 1350 Note, creates a tort action for two specifically-defined wrongs: torture and extrajudicial killing. The duties created by the TVPA are distinct from those imposed by international law.

To the extent that the ATCA's creation of a federal venue is significant, it is noteworthy that the ATCA was not a necessary key to our country's courts at the time of its enactment. The law of nations "became a part of the law *of the United States* upon the adoption of the Constitution." *Filartiga,* 630 F.2d at 886. As Alvarez himself explains, "Congress adopted the ATCA with the knowledge that [international torts] could already be brought under the laws of the several states, because of the absorption of the law of nations . . . into state common law. Congress wished to provide the option of federal court jurisdiction for alien plaintiffs who might fear bias in state courts." Opposition to Motion to Dismiss on Behalf of the United States at 8; *see Tel-Oren,* 726 F.2d at 782-83 (Edwards, J., concurring).

Finally, finding that claims under the ATCA do not fall within § 2679(b)(2)(B) is consistent with the general purpose of the Liability Reform Act. As emphasized in *Smith,* 111 S. Ct. at 1185 n.9 and 1189 n.16, the House committee report stated that the exclusive remedy provision of the Liability Reform Act "is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the scope of employment." H.R. Rep., No. 700, 100th Cong., at 6, *reprinted in* 1988 U.S.C.C.A.N. 5945, 5950. The Court doubts that Congress intended § 2679(b)(2)(B) to permit a broad exception for violations of international law.

Thus, the Court finds that the logic of *Smith* is persuasive in this case. An infraction of the law of nations is not a "violation" of the ATCA and the federal statutory claims exception to the Liability Reform Act does not benefit Alvarez.

3. Constitutional Claims Exception

Alvarez further argues that his claims under international law fall within the constitutional claims exception to the Liability Reform Act, 28 U.S.C. § 2679(b)(2)(A), on the ground that the international law is constitutionally incorporated into United States law. This contention plainly lacks merit. As noted earlier, international law is an integral part of the *common law*. *Estate I*, 978 F.2d at 502; *Filartiga*, 630 F.2d at 886. The Constitution's only reference to the law of nations is contained in Article I, sec. 8, cl. 10, which grants to Congress the power to "define and punish . . . Offenses against the Law of Nations."

To summarize, the Court holds that the claims under international law are subject to substitution under the Liability Reform Act. Since Alvarez admits that the California and Mexican law claims are subject to substitution, the only remaining claims against the four moving defendants are those based on the Constitution.

C. Qualified Immunity

In his fifth claim for relief, based on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), Alvarez alleges that the defendants deprived him of unspecified rights under the Fourth, Fifth and Eighth Amendments. He very generally complains of defendants' "acts of kidnapping, torture, cruel, inhuman and degrading treatment or punishment, denial of adequate medical treatment and prolonged arbitrary detention." First Amd. Complt., para. 39.

The Eighth Amendment claim is plainly untenable since it applies only after a defendant has been convicted, *Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40 (1977), and Alvarez was acquitted. Thus, the Court need only evaluate the claims under the Fourth and Fifth Amendments.

The moving defendants invoke the protection of qualified immunity. Under this doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A two-part analysis is required. *Act Up!/ Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1983). First, the plaintiff must prove that the law governing the official's conduct was clearly established at the time of the alleged wrongdoing. *Houghton v. Smith*, 965 F.2d 1532, 1534 (9th Cir. 1992); *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). Second, the official must prove that under the law a reasonable official could have believed the conduct was lawful. *Houghton*, 965 F.2d at 1534; *Benigni v. City of Hemet*, 879 F.2d 473, 479 (9th Cir. 1988).

The threshold determination of whether the law governing the conduct at issue is clearly established is a question of law for the court. *Act Up!*, 988 F.2d at 873. The determination of whether the facts alleged could support a reasonable belief that the officer's conduct was legal "is also a question of law to be determined by the courts." *Id.* (citing *Hunter v. Bryant*, 112 S. Ct. 534 (1991)). The question is whether the officer "acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of events" is possible. *Hunter*, 112 S. Ct. at 537.

1. Events While Alvarez Was in Mexico

The qualified immunity analysis in this action requires a temporal bifurcation: the events occurring prior to Alvarez's arrival in the United States on April 3, 1990 must be considered separately from the events occurring afterwards. The Court finds that, at the time of Alvarez's

abduction, it was not clearly established whether nonresident aliens situated outside of the United States enjoyed the protection of the Fourth and Fifth Amendments.

As an initial matter, the Court is unpersuaded by the defendants' reliance on the *Ker-Frisbie* doctrine. In *Ker v. Illinois*, 119 U.S. 436 (1886), and *Frisbie v. Collins*, 342 U.S. 519 (1952), the Supreme Court held that the forcible abduction of a criminal defendant does not divest a court of jurisdiction to try the defendant. "There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." *Id.* at 522. The Supreme Court discussed and applied *Ker-Frisbie* in the underlying criminal appeal. *United States v. Alvarez-Machain*, 112 S. Ct. at 2192-93.

The *Ker-Frisbie* doctrine is properly limited to the jurisdiction of a court to hear criminal charges against an abducted defendant. Several courts of appeals have recognized that a defendant who cannot obtain dismissal because of *Ker-Frisbie* may commence a civil action for the constitutional torts committed by his or her abductors. *United States v. Mitchell*, 957 F.2d 465, 470 (7th Cir. 1992); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 261 n.7, 262 (7th Cir.), *cert. denied*, 498 U.S. 878 (1990); *Brown v. Nutsch*, 619 F.2d 758, 764 (8th Cir. 1980); *Waits v. McGowan*, 516 F.2d 203, 208 (3d Cir. 1975); *see also Brown v. Doe*, 2 F.3d 1236, 1243 (2d Cir. 1993) (action under 42 U.S.C. § 1983, not dismissal, is proper remedy for mistreated pre-trial detainee), *cert. denied*, 114 S. Ct. 1088 (1994). The defendants offer no authority for the proposition that *Ker-Frisbie* may be used as a shield by abductors in civil actions for damages.

Independent of *Ker-Frisbie* is the question of whether the protections of the Constitution extend to nonresident aliens situated abroad. Approximately five weeks prior to the abduction of Alvarez, the Supreme Court rendered

its decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Like Alvarez, Verdugo was a citizen and resident of Mexico and a suspect in the murder of Camarena. Verdugo was transported to the border by Mexican police officers and arrested by United States officials. Shortly thereafter, United States and Mexican authorities jointly searched Verdugo's residences in Mexico. Verdugo moved to suppress the seized evidence.

The Supreme Court held that Verdugo lacked sufficient contacts with this country to enjoy Fourth Amendment protection. Per Justice Rehnquist, the Court stated that "the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own government; it was never intended to restrain the actions of the Federal Government against aliens outside of United States territory." *Id.* at 266. Citizens of the United States located abroad are protected by the Constitution, as are aliens who are present in and have significant connection to this country. *Id.* at 270-71. The Court determined that Verdugo's short-term presence in this country at the time of the searches was "fortuitous" and did not vest him with Fourth Amendment rights. *Id.* at 271-72.

Alvarez attempts to undercut the significance of *Verdugo-Urquidez* in two ways. First, he erroneously claims that the decision was rendered after his abduction. Second, he argues that Justice Rehnquist wrote for a plurality. In fact, the opinion was endorsed by five justices; in a concurrence, Justice Kennedy noted his "fundamental" agreement with the Court, but pointed out several disagreements with Justice Rehnquist's reasoning. *Id.* at 275. Justice Kennedy fully endorsed the principle that "the Constitution does not require United States agents to obtain a warrant when searching the foreign home of a non-resident alien." *Id.* at 278.

In light of *Verdugo-Urquidez*, it was not clearly established that the Fourth Amendment applied to Alvarez when he was seized in Mexico. At best, Alvarez can say that there is some ambiguity about the scope of Fourth Amendment rights after the Supreme Court's decision, which does not defeat the immunity claim.

While all claims of excessive force in the course of an arrest are analyzed under the Fourth Amendment, *Graham v. Connor*, 490 U.S. 386, 395 (1989), *United States v. Reese*, 2 F.3d 870, 883 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 928 (1994), Alvarez also claims that his Fifth Amendment rights were violated. When an arrest ends, substantive due process protects the pre-trial detainee from the use of excessive force that amounts to punishment. *Graham*, 490 U.S. at 395 n.10 (1989). "The right of the custodial subject to be protected from harm is firmly rooted in substantive due process jurisprudence." *United States v. Koon*, 94 Daily Journal D.A.R. 11624, 11639-40 (9th Cir. August 19, 1994). A person is in custody when "in light of all the circumstances surrounding the incident, a reasonable person in that situation would have believed he or she was not free to leave." *Id.* at 11640. Thus, the Court will assume that substantive due process rights potentially attached while Alvarez was in Mexico.

"Although *Verdugo* is a Fourth Amendment case, it nonetheless provides a helpful analytical framework for determining whether other constitutional provisions apply to governmental activities having extraterritorial dimensions." *Lamont v. Woods*, 948 F.2d 825, 834 (2d Cir. 1991) (considering the Establishment Clause). Comparing the terms of the Fourth and Fifth Amendments, the Supreme Court noted that the latter applies to "persons" while the former applies to "the people" which he construed as meaning "the people of the United States." *Verdugo-Urquidez*, 494 U.S. at 265-66. This distinction suggests that the Fifth Amendment applies more broadly

than the Fourth. However, the balance of the opinion suggests that the Fifth Amendment should be construed as lacking extraterritorial application with respect to non-resident aliens. After discussing the so-called *Insular Cases*, which hold that only fundamental constitutional rights are guaranteed to residents of territories controlled by the United States, the Court observed:

> Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States. In *Johnson v. Eisentrager*, 339 U.S. 763 . . . (1950), the Court held that enemy aliens arrested in China and imprisoned in Germany after World War II could not obtain writs of habeas corpus in our federal courts on the ground that their convictions for war crimes had violated the Fifth Amendment and other constitutional provisions. . . . [O]ur rejection of extraterritorial application of the Fifth Amendment was emphatic:
>
> > Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of the Court supports such a view. None of the learned commentators on our Constitution even hinted at it. The practice of every modern government is opposed to it. *Id.* at 784.

Verdugo-Urquidez, 494 U.S. at 269. This language strongly suggests that the Fifth Amendment does not apply outside our borders.

Additionally, the Court expressed a policy rationale for limiting the application of the Fourth Amendment that is equally applicable to substantive due process

rights: the deleterious effect of judicial restraint of law enforcement and military operations abroad. *Id.* at 273-74. If Verdugo had prevailed in his suppression motion,

> aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters. Perhaps a *Bivens* action might be unavailable in some or all of these situations due to "special factors counselling hesitation," but the Government would still be faced with case-by-case adjudications concerning the availability of such an action. And even were *Bivens* deemed wholly inapplicable in cases of foreign activity, that would not obviate the problems attending the application of the Fourth Amendment abroad to aliens. The Members of the Executive and Legislative Branches are sworn to uphold the Constitution, and they presumably desire to follow its commands.

Id. at 274 (citations omitted). It would be anomalous if law enforcement officers were not subject to constitutional limitation in searching and seizing a person abroad (under the Fourth Amendment) but were subject to limitation in holding that seized person (under substantive due process).

A Ninth Circuit panel, albeit in passing, has read *Verdugo-Urquidez* for the broad proposition that "the Constitution itself does not apply to aliens whose claims arise outside the United States." *Estate II*, 25 F.3d at 1476 n.12. The *Estate II* court was considering whether tort claims against the Marcos estate abated on the death of the plaintiff or the defendant and analogized to claims under the Eighth Amendment and 42 U.S.C. § 1983. *Id.* at 1476. The Court does not regard footnote 12 as a definitive statement of the scope of *Verdugo-Urquidez* though the footnote provides some support for an expansive reading of the Supreme Court's opinion.

Alvarez cites several lower court cases decided before and after *Verdugo-Urquidez* in support of his position that the Fifth Amendment applies to nonresident aliens outside the United States. In only one of cases he cites, *Xiao v. Reno*, 837 F. Supp. 1506 (N.D. Cal. 1993), did a court actually suggest that the Amendment has such extraterritorial scope. *Id.* at 1547-48.[9] In *Xiao*, the court concluded that an alien could claim substantive due process violations based on acts taken by United States officials while he was detained in the People's Republic of China. The court distinguished *Verdugo-Urquidez* on the ground that the plaintiff complained of an American prosecutorial effort that spanned two years while the constitutional deprivations claimed by Verdugo occurred on a single day. The court also stressed that many of the improper actions were taken by United States officials inside the country. *Id.* at 1548.

To the extent that *Xiao* affords due process rights to nonresident aliens abroad and is correct in so doing, it is distinguishable. Alvarez complains of a single incident, his abduction, that occurred over a short time period. He does not argue that his physical mistreatment in Mexico can be considered a due process violation that arose in the United States. *See Verdugo-Urquidez*, 494 U.S. at 264 (violation of Fourth Amendment occurs solely in country of search). These distinctions aside, the significance of *Xiao* is limited because the court did not decide whether the due process right at issue was clearly established; since the defendants in that case were sued in their official capacities, they could not claim immunity. Further, *Xiao* was decided in March 1993, three years after Alvarez was abducted, and thus could not have provided guidance to the defendants at the time of their actions as to the scope of the Due Process Clause.

---

[9] The other cases cited by Alvarez all involve due process claims by aliens held in territory controlled by the United States, not territory of a foreign sovereign.

In sum, the Court finds that the qualified immunity analysis with respect to events preceding Alvarez's arrival in the United States is controlled by *Verdugo-Urquidez*. Alvarez lacked clearly established rights and, therefore, the defendants are entitled to immunity.

2. *Events After Alvarez Arrived in the United States*

Once Alvarez arrived in the United States, he was protected by the Constitution from mistreatment at the hands of his captors. Pretrial detainees possess clearly established due process rights, including a right to be free from punishment, *Bell v. Wolfish*, 441 U.S. 520, 534-37 (1979), *Redman v. County of San Diego*, 942 F.2d 1435, 1440 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 972 (1992), that are at least as great as those afforded to convicted persons by the Eighth Amendment. However, Eighth Amendment standards provide a baseline of care. *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986). Under the Eighth Amendment, an inmate must be provided with basic human needs: food, clothing, shelter, sanitation, medical care and personal safety. *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982). An official must act with at least deliberate or reckless indifference to violate a pretrial detainee's rights. *Redman*, 942 F.2d at 1443.

Apparently, Alvarez's most serious claims of mistreatment (i.e. beating, electrical shocks, threats and injections) pertain to the events prior to his arrival in El Paso. The constitutional claims after his arrival are stated generally. Three potential constitutional violations emerge from paragraphs 17 and 19 of the First Amended Complaint: (1) the DEA agents including Berellez "threatened" Alvarez while interrogating him on April 3-4; (2) the agents denied him food during this time; and (3) the DEA initially incarcerated him under a false name, mak-

ing it impossible for Alvarez to be reached by his family, attorney or the Mexican government.[10]

Except as these claims identify Berellez, the involvement of the four moving defendants is unclear, rendering it difficult to determine whether they personally participated in or directed the conduct at issue, or knew of the conduct and failed to prevent it. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (supervisors not vicariously liable for constitutional torts of subordinates). On the other hand, the pleading requirements of Fed.R.Civ.P. 8 are minimal.[11]

The Court determines that the allegations of constitutional wrongs in the United States are sufficient to defeat the claim to qualified immunity. Alvarez may be able to prove that the defendants violated his clearly established constitutional rights and will be given the opportunity to obtain such proof.

---

[10] Two other potential constitutional violations are discernable from the First Amended Complaint.

In paragraph 51 (part of the claim for intentional infliction of emotional distress), Alvarez alleges that Berellez, Garate and others "threatened [him], locked him in a small windowless room when he refused to cooperate, and forced him to stand naked and be photographed." It is unclear whether Alvarez claims that this incident amounted to a constitutional tort.

Additionally, as stated in footnote 3 above, Alvarez claims that he was deprived of adequate medical care while in custody in the United States, but abandons this contention in his opposition papers.

[11] A heightened pleading standard applies to *Bivens* cases where the defendant is entitled to assert the qualified immunity defense and where her or his knowledge or intent is an element of the plaintiff's constitutional tort. *Branch v. Tunnell*, 14 F.3d 449, 452 (9th Cir.), *cert. denied*, 114 S. Ct. 2704 (1994). The defendants do not argue that the heightened standard should apply in this case.

II. Motion to Substitute the United States for Defendants Garate and Sosa

Pursuant to the Liability Reform Act, discussed in section I.B. above, the United States moves to substitute itself for Garate and Sosa on all but the constitutional claims. Garate and Sosa join in the motion.

The Attorney General has certified that Garate and Sosa were federal employees acting in the course and scope of their employment at the time of the underlying events. Attachment to Motion to Substitute. However, unlike in the previous motion, Alvarez contests this certification. He contends that Garate and Sosa were not employees and, even if they were, they were not acting in the scope of their employment when they mistreated him.

The Attorney General's certification is subject to *de novo* review by the district court, *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 745 (9th Cir. 1991), both as to employment and as to action within scope of employment. *Wang v. Horio*, 741 F. Supp. 1373, 1376-77 (N.D. Cal. 1989), *aff'd in part and rev'd in part sub nom. Wang v. United States*, 947 F.2d 1400 (9th Cir. 1991) (see especially footnote 3). The plaintiff bears the burden of presenting evidence and disproving the certification. *Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993).

Federal law governs the question of whether an individual is a federal employee. *Ward v. Gordon*, 999 F.2d 1399, 1403 (9th Cir. 1993). An "employee of the government" encompasses a person "acting on behalf of a federal agency in an official capacity, temporarily or permanently, in the service of the United States, with or without compensation." 28 U.S.C. § 2671. Despite this broad definition, in accord with common law principles independent contractors are not regarded as federal employees. *United States v. Orleans*, 425 U.S. 807, 813-14 (1976); *Logue v. United States*, 412 U.S. 521, 528 (1973). As stated by the Ninth Circuit, the "critical test

for distinguishing an agent from a contractor is the existence of federal authority to control and supervise the 'detailed physical performance' and 'day to day operations' of the contractor, and not whether the agency must comply with federal standards and regulations." *Carrillo v. United States*, 5 F.3d 1302, 1304 (9th Cir. 1993) (quoting *Ducey v. United States*, 713 F.2d 504, 516 (9th Cir. 1983)).

The United States, Garate and Sosa rely on Judge Rafeedie's factual findings and the allegations in Alvarez's First Amended Complaint and administrative tort claim. In essence, the movants take the position that Judge Rafeedie's findings conclusively establish an employer-employee relationship and that Alvarez's allegations amount to a judicial admission of employee status. "Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them." *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988).

Although Judge Rafeedie's findings of fact do not have issue-preclusive effect, a point discussed in section III.A below, the Court may consider the facts therein for purposes of this motion. The findings are ambiguous with respect to the status of Garate and Sosa. Judge Rafeedie determined that the abductors acted as "paid agents" of the United States. 745 F. Supp. at 605. Berellez testified that the "final terms" of the abduction were approved by the DEA and Garate testified that he "could not take any step" without seeking the approval of Berellez. *Id.* at 603 and n.7. On the other hand, the operation was conducted in Mexico and Berellez "testified that no DEA agents participated in the actual kidnapping." *Id.* at 603. Berellez did not know whether the abductors were acting under the authority of the Mexican government. *Id.* at 603 n.8. Sosa is not even mentioned in Judge Rafeedie's opinion.

Apparently, Judge Rafeedie used the term "paid agent" in accord with the analytical framework enunciated by the Ninth Circuit in *United States v. Lovato*, 520 F.2d 1270 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 985 (1975). The *Lovato* court suggested that, notwithstanding the *Ker-Frisbie* doctrine, a district court may lack jurisdiction over an abducted defendant who is subjected to "grossly cruel and unusual barbarities" by "persons who can be characterized as paid agents of the United States." *Id.* at 1271.[12] A "paid agent" under *Lovato* is not necessarily an "employee" under 28 U.S.C. § 2671.

In the First Amended Complaint, Alvarez alleges that: he was kidnapped "by U.S. agents" and his kidnapping and mistreatment were "orchestrated by the United States and its agents," para. 1; the United States is responsible "for the acts of each and every" other defendant, "all of whom were acting as its agents or employees," para. 5; Berellez "was directly involved in or supervised the U.S. government operation," para. 6; Garate, a "paid agent," planned and implemented the decision to kidnap, para. 10; and Sosa, also a "paid agent," was "directly responsible" for the kidnapping, para. 11. Alvarez's use of the term "agent" appears to be an adoption of Judge Rafeedie's terminology, not an admission of employment status.

The language in the administrative claim is similar to that in the First Amended Complaint. *See* Claim for Damage, Injury or Death, attachment to Sosa's Request for Judicial Notice, filed July 25, 1994. Even if the claim is more suggestive of employment status, the allegations therein are not properly regarded as judicial admissions.

---

[12] *Lovato* followed the lead of the Second Circuit in *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975), and *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). The theory recognized by these cases is often referred to as the "*Toscanino-Lovato* exception" to the *Ker-Frisbie* doctrine.

The First Amended Complaint can be regarded as an amendment to the administrative claim.

Neither Judge Rafeedie nor Alvarez unmistakably identify Garate and Sosa as "employees" as that term is defined in 28 U.S.C. § 2671. An "agent" can be an employee or an independent contractor. *See* Restatement (Second) of Agency §§ 2, 14N (1958); Black's Law Dictionary 62 (6th ed. 1990) (offering as one definition of "agency" a "[r]elation in which one person acts for or represents another by latter's authority, either in the relationship of principal and agent, master and servant, or employer or proprietor and independent contractor"); *Ducey*, 713 F.2d at 516 (agreeing with government's argument that "agent" of United States was an independent contractor). Thus, the use of the label "agent" or "paid agent" is not dispositive; rather, the Court must evaluate the actual relationship between the federal government and Garate and Sosa.

Of course, the theory that Garate and Sosa were independent contractors conflicts with the allegation that the United States is liable for the acts of each and every defendant. First Amd. Complt., para. 5. Under the FTCA, the United States is responsible for the torts of its employees. 28 U.S.C. § 1346(b). However, pursuant to Rule 8(e)(2) of the Federal Rules of Civil Procedure, plaintiffs may plead inconsistent claims as long as such claims comply with the requirements of Rule 11.

Plaintiffs with colorable claims that defendants were not federal employees must be allowed a reasonable opportunity for discovery. *See Hafer v. Melo*, 13 F.3d 736, 747 (3d Cir. 1994); *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1544 (11th Cir. 1990), *modified*, 924 F.2d 1555, *cert. denied*, 112 S. Ct. 62 (1991). If requested by the parties, an evidentiary hearing may be necessary to resolve disputed questions of jurisdictional fact. *See Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865, 874 (9th Cir. 1992). For now,

since Alvarez may be able to prove that Garate and/or Sosa were independent contractors, the motion to substitute must be denied. It is unnecessary to reach the scope of employment question.

III. *Motions to Dismiss Filed by Garate and Sosa*

Since the motions to dismiss of Garate and Sosa are very similar, the Court will address them concurrently.

A. Collateral Estoppel

Garate and Sosa argue that Alvarez is collaterally estopped from claiming that he was tortured and mistreated by his abductors in Mexico. Garate also suggests that estoppel should apply to the alleged abusive interrogation of Alvarez in El Paso. The Court rejects these contentions.

"Collateral estoppel, or issue preclusion, bars the relitigation of issues actually adjudicated in previous litigation between the same parties." *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992). A three-part test applies:

> (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the prior litigation.

Id.

"The party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment." *Id.* at 1321. The party must "introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated." *Id.*

Traditionally, the party invoking estoppel must have been a party to the previous litigation. However, under

modern law, persons who were not parties in a case have standing to assert the defense of collateral estoppel in a subsequent proceeding. *Green v. Ancora-Citronelle Corp.*, 577 F.2d 1380, 1383-84 (9th Cir. 1978).

Alvarez argued before Judge Rafeedie that his indictment should be dismissed on due process grounds under the *Toscanino-Lovato* exception to *Ker-Frisbie*. *See supra*, note 12. Judge Rafeedie held that, taking Alvarez's allegations as true, they did not "constitute acts of such barbarism as to warrant dismissal of the indictment under the case law." 745 F. Supp. at 605. The Judge went on to find that Alvarez's claims were "not worthy of belief." *Id.* *Toscanino-Lovato* aside, Judge Rafeedie held that Alvarez's abduction violated the extradition treaty between the United States and Mexico.

The Ninth Circuit affirmed Judge Rafeedie's ruling that the abduction violated the treaty and did not address the due process claim. The Supreme Court reversed, also not addressing the due process claim. On remand, the Ninth Circuit addressed the due process claim for the first time. *United States v. Alvarez-Machain*, 971 F.2d 310 (9th Cir. 1992). The court stated: "Alvarez-Machain's main alternative argument is that the circumstances of his abduction were so shocking that the abduction constituted a denial of due process. This contention similarly is not supported by the district court's findings." *Id.* at 311.

Judge Rafeedie's opinion does not discuss Alvarez's allegations of abuse based on events after his arrival in the United States. Hence, collateral estoppel is potentially applicable to the happenings in Mexico only, i.e., to the abduction.

Under the first element of the collateral estoppel standard, the issues at stake in this litigation are not identical to those before Judge Rafeedie. The issue there was whether the alleged governmental misconduct was so offensive to due process as to deprive the district court of

jurisdiction, not whether the abductors had committed acts that could support a tort claim by Alvarez for damages. Judge Rafeedie clearly recognized that the legal standard at issue was particularly high: he stated that had Alvarez's abductors flogged him, the wrong would not have been sufficiently barbaric to justify dismissal. 745 F. Supp. at 605 n.10. Clearly, the flogging of a pretrial detainee would offend due process and could form the basis of a *Bivens* claim.

Additionally, under the third element of the collateral estoppel standard, Judge Rafeedie's rejection of Alvarez's claims of mistreatment was not a critical and necessary part of the judgment. Judge Rafeedie first ruled that Alvarez's allegations were insufficient as a matter of law even if they were taken as true. *Id.* at 745. Hence the Judge's subsequent rejection of the truth of the allegations amounts to mere *dicta.* The Ninth Circuit may have affirmed Judge Rafeedie on the basis of the insufficiency of the alleged mistreatment, not because it agreed that Alvarez's allegations were not worthy of belief. If an appellate court affirms on one ground used by the trial court without passing on a second ground used by the trial court, the second ground does not have preclusive effect. *Fireman's Fund Ins. Co. v. Int'l Market Place*, 773 F.2d 1068, 1069 (9th Cir. 1985) (citing 1B J. Moore, Federal Practice ¶ 0.416[2], at 518 (2d ed. 1984)).

B. Bivens Claim

Garate and Sosa offer four arguments in support of dismissal of the *Bivens* claim: (1) they are qualifiedly immune from suit; (2) the claim is barred by the statute of limitations; (3) the Fourth and Fifth Amendments do not apply to nonresident aliens outside of the United States; and (4) even if the Amendments do apply abroad, "special factors counselling hesitation" preclude recognition of a cause of action.

1. Qualified Immunity

As discussed in section II above, the Court presently cannot determine whether Garate and Sosa acted as independent contractors or employees of the government. If they fall into the former category they are not entitled to the protection of qualified immunity.

It is clearly established in this circuit that "the private status of the defendant will not serve to defeat a *Bivens* claim, provided that the defendant engaged in federal action." *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1337-38 (9th Cir. 1987). A defendant acts under color of federal law if he or she engages in joint action with governmental agents or if he or she exercises powers traditionally reserved to the state. *Id.* at n.17. Although private parties may be liable under *Bivens*, they are not entitled to qualified immunity. *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th Cir. 1989); *Howerton v. Gabica*, 708 F.2d 380, 385 n.10 (9th Cir. 1983). While at least one court of appeals has taken the position that private parties can claim immunity if they can be considered functionally governmental employees, *Frazier v. Bailey*, 957 F.2d 920, 928 (1st Cir. 1992), the *F.E. Trotter* court adopted a broad categorical approach based on the public or private status of the defendant.

The Ninth Circuit position is supported by the Supreme Court's decision that private defendants charged under 42 U.S.C. § 1983 for invoking state replevin, garnishment and attachment statutes later declared unconstitutional are not entitled to qualified immunity. *Wyatt v. Cole*, 112 S. Ct. 1827 (1992). The Court noted that unlike public officials, private parties "hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good. . . . In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity." 112 S. Ct. at 1833-34. As one court of appeals observed, the

Wyatt analysis does not bode well for the continued vitality of decisions affording qualified immunity to private parties. *Burrell v. Bd. of Trustees of Georgia Military College*, 970 F.2d 785, 794-95 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1814 (1993).

2. Statute of Limitations

Garate and Sosa assert that the *Bivens* claim is time-barred since the alleged constitutional torts occurred more than one year prior to the institution of this action.

The statute of limitations for *Bivens* claims is the state personal injury statute. *Van Strum v. Lawn*, 940 F.2d 406, 410 (9th Cir. 1991). In California, the period is one year. Cal. Civ. Proc. Code § 340(3); *Matthews v. Macanas*, 990 F.2d 467, 469 (9th Cir. 1993).[13] Prior to *Van Strum*, the applicable statute of limitations was the forum state's "catch-all" statute, which in California is four years. Cal. Civ. Proc. Code § 343; *Marshall v. Kleppe*, 637 F.2d 1217, 1224 (9th Cir. 1980). For actions accruing prior to the decision in *Van Strum*, the limitations period runs one year from the date of that decision or at the end of the previously applicable limitations period, whichever occurs sooner. *Van Strum*, 940 F.2d at 411. Accordingly, to the extent that the *Bivens* claim in this action accrued prior to March 5, 1991 (the date *Van Strum* was decided), the statute of limitations ran on March 5, 1992.

Alvarez argues that the statute of limitations was tolled during the period of his incarceration, i.e. from April 2, 1990 to December 14, 1992, pursuant to California Code of Civil Procedure § 352.[14] State tolling statutes such as

---

[13] In his reply papers, Sosa maintains that the *Bivens* claim should be governed by the statute of limitations under Texas law, not California law. This contention is untimely and will not be considered herein.

[14] Section 352(a)(3) provides for tolling if the plaintiff, at the time his or her action accrued, was "[i]mprisoned on a criminal

§ 352 apply to *Bivens* claims as well as claims under 42 U.S.C. § 1983. *See Hardin v. Straub*, 490 U.S. 536, 543-44 (1989); *Elliott v. City of Union City*, 25 F.3d 800, 802 (9th Cir. 1994); *Lewellen v. Morley*, 875 F.2d 118, 120 (7th Cir. 1989). Thus, the Court finds that Alvarez's *Bivens* claim was tolled until December 14, 1992. He filed the Complaint on July 9, 1993, well within the one-year limitations period.

Garate contends that, even if the claim was tolled until December 14, 1992, the statute ran as to him because he was not served until after January 31, 1994, when the First Amended Complaint was filed. This argument rests on an erroneous view of the effect of untimely service on the statute of limitations. Garate was named as a defendant in the Complaint. Since the Complaint was never formally dismissed as to Garate based on untimely service, *see* Fed.R.Civ.P. 4(m), the limitations period did not run after July 9, 1993. The First Amended Complaint superseded and related back to the Complaint. Fed.R.Civ.P. 15(c)(2).

Thus, the Court rejects all statute of limitations challenges to the *Bivens* claim.

3. Extraterritorial Application of the Fourth and Fifth Amendments

In section I.C.1 above, the Court determines that the extraterritorial application of the Fourth and Fifth Amendments was not clearly established at the time of the events underlying this action. Since Garate and Sosa are not, at least for now, entitled to qualified immunity, the Court must reach the question of whether Alvarez actually can claim the protection of the Amendments.[16]

---

charge, or in execution under the sentence of a criminal court for a term less than for life. . . ."

[16] Cognizant of the principle that unnecessary interpretation of the Constitution should be avoided, the Court considered the de-

The clear import of *Verdugo-Urquidez*, 494 U.S. 259, is that the Fourth Amendment does not apply abroad with respect to aliens who have little attachment to this country. That *Verdugo-Urquidez* involved a search of a person's property and this case involves the seizure of a person makes no difference. For the reasons stated earlier, the Court believes that *Verdugo-Urquidez* also must be read as encompassing the Fifth Amendment substantive due process rights of persons in custody. If the Fourth Amendment does not protect a noncitizen of the United States in a foreign country from an unreasonable seizure, the Fifth cannot protect that person from physical mistreatment at the hands of his or her captors.

It is worth underscoring that the Court's conclusion as to the reach of Fifth Amendment substantive due process rests on the understanding that the mistreatment of Alvarez in Mexico was "fully accomplished" in that country. *See id.* at 264; *cf. Lamont*, 948 F.2d at 834 (holding that grants of government funds for the benefit of foreign sectarian institutions violated the Establishment Clause, if at all, in the United States). By comparison and hypo-

---

fendants' argument that "special factors counselling hesitation in the absence of affirmative action by Congress" bar a *Bivens* action even in the event that the Fourth and Fifth Amendments apply abroad. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412, 420-23 (1988); *Bricker v. Rockwell Int'l Corp.*, 22 F.3d 871, 873-74 (9th Cir. 1993). There is some support for this contention. *See Verdugo-Urquidez*, 494 U.S. at 273-74 (suggesting that *Bivens* actions might be unavailable in cases involving extraterritorial law enforcement and military operations); *Reagan v. Sanchez-Espinoza*, 770 F.2d 202, 208-09 (D.C. Cir. 1985) (declining to permit a *Bivens* claim against executive officials for support of insurgent forces in Nicaragua). However, the action before the Court arises from the seizure of a single person at the direction of United States law enforcement authorities. The Court is not persuaded that the recognition of a *Bivens* claim in this context would "significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Verdugo-Urquidez*, 494 U.S. at 273-74; *see id.* at 291-93 (Brennan, J., dissenting).

thetically, an attempt by prosecutors to introduce a confession obtained in Mexico during Alvarez's criminal trial could have violated the Fifth Amendment privilege against self-incrimination, since that wrong would arise only at trial. *Verdugo-Urquidez*, 494 U.S. at 264.

Garate and Sosa may be liable under *Bivens* for violations of the Fourth and Fifth Amendments after Alvarez entered the territory of the United States. Accordingly, as is the case with defendants Berellez, Waters, Gruden and Lawn, the Court dismisses the *Bivens* claim as to Garate and Sosa only with respect to the alleged extraterritorial misconduct.

C. ATCA Claim

As discussed in the context of the United States' Motion to Substitute, see section II above, Garate and Sosa may be liable for violations of the ATCA if they were acting as independent contractors during the underlying events. Since Garate and Sosa do not presently enjoy immunity under the Liability Reform Act, the Court must reach their additional arguments in support of dismissal of the ATCA claim. In particular, the defendants contend (1) that Alvarez cannot state an ATCA claim against them in their personal capacities because private actors cannot violate the law of nations, and (2) that any ATCA claim is time-barred by the same one-year statute of limitations that applies to *Bivens* claims.

1. Cognizability of Personal-Capacity Actions

Garate and Sosa are sued in their personal capacities. First Amd. Complt., paras. 10 and 11. Relying on the decision of the court of appeals in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), they argue that ATCA claims cannot be stated against private individuals as a matter of law.

In *Sanchez-Espinoza*, a panel of circuit judges, including future Supreme Court Justices Scalia and Ginsburg, considered an ATCA claim brought by citizens of Nicaragua and others based on United States support for rebel forces in Nicaragua, commonly known as the "Contras." The defendants included nine senior executive officials who were sued in their official and personal capacities. *Id.* at 204-05.

The court stated that the law of nations "does not reach private, non-state conduct" and thus concluded that the executive officials could not be held personally liable under the ATCA. *Id.* at 206-07. In support of this proposition, the court cited the concurring opinions of Judges Edwards and Bork in *Tel-Oren*, 726 F.2d 774. Judge Edwards rejected the contention that a private entity such as the Palestine Liberation Organization not acting under color of state authority could violate the law of nations by engaging in torture. *Id.* at 791-95. Judge Bork, though somewhat obliquely, also underscored the significance of private as opposed to state action. *Id.* at 807, 819.

Two deficiencies are apparent in *Sanchez-Espinoza*. First, in stating that the law of nations "requires action authorized by the sovereign as opposed to private wrongdoing," 770 F.2d at 207, the court glossed over a significant distinction alluded to by Judge Edwards in *Tel-Oren*: persons acting under color of law may be liable for violations of the law of nations. *Id.* at 793. The Ninth Circuit on two recent occasions has recognized this very point. *Estate I*, 978 F.2d at 501-02 (a person who acts "under official authority or under color of such authority may violate international law"); *Estate II*, 25 F.3d at 1472 n.8 (action within official mandate not a prerequisite for violation of international law). More importantly, *Sanchez-Espinoza* fails to recognize that government officers may be personally liable for actions taken in their official capacities. *See Hafer v. Melo*, 112 S. Ct. 358,

363 (1991).[16] Only personal immunity defenses are available to individual-capacity defendants, not sovereign immunity. *Id.* at 362. Of particular note, under the Liability Reform Act, which was enacted after *Sanchez-Espinoza*, federal employees acting within the course and scope of their employment are shielded from suit under the ATCA.

Since an individual who acts under color of law may violate the law of nations, and Alvarez may be able to prove that Garate and Sosa acted under color of United States and/or Mexican law, a personal-capacity ATCA claim may be stated against them.

2. Statute of Limitations

The ATCA contains no statute of limitations. When a federal statute provides a cause of action and includes no express limitations period, courts follow the period of the most analogous state statute if it is not inconsistent with federal law or policy to do so. *Wilson v. Garcia*, 471 U.S. 261, 266 (1985).

Only one court has addressed the limitations period for claims under the ATCA. In *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), the court found that the closest analogy to the ATCA in state law is the common law personal injury action. *Id.* at 1547. The court then determined that 42 U.S.C. § 1983 provided the most analogous federal cause of action. *Id.* at 1547-48. Since § 1983 claims are governed by the forum state's personal injury limitations period, the court found no reason to look beyond state law for a limitations period. The court applied the statute of limitations for the forum state, which in California is one year. Cal. Civ. Proc. Code § 340(3).

---

[16] Although *Hafer* discussed the distinction between official and personal capacity actions in the context of 42 U.S.C. § 1983, its analysis seems equally applicable to actions under *Bivens* or the ATCA.

The defendants contend that the Court should follow *Forti* and apply a one-year limitations period, while Alvarez asserts that the Court should apply a ten-year limitations period consistent with § 2(b) of the TVPA, 28 U.S.C. § 1350 Note. The debate is academic in this case because even if the one-year rule applies, Alvarez's ATCA claim was tolled during the period of his incarceration. *See supra*, section III.B.2. Therefore, the statute of limitations does not bar the ATCA claim.

D. TVPA Claim

Alvarez alleges that the Court has subject matter jurisdiction under the TVPA "over the claims against the Mexican nationals who actually kidnapped Plaintiff from his medical office and subjected him to torture." First Amd. Complt., para. 2. He defines "the kidnappers" as Sosa and the five unnamed defendants who were directly involved in the kidnapping. *Id.*, para. 11. In the torture claim, Alvarez asserts that "the kidnappers" who acted under color of Mexican law are liable under the TVPA. *Id.*, para. 27. From these allegations, it is clear that only Sosa and the unnamed defendants are charged with violating the TVPA.

The TVPA provides:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> > (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
> >
> > (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

TVPA § 2(a), 28 U.S.C. § 1350 Note. The Act requires exhaustion of "adequate and available remedies" in the

place where the conduct giving rise to the claim occurred. *Id.*, § 2(b). The statute of limitations is ten years. *Id.*, § 2(c).

Sosa advances three arguments in support of dismissal of the TVPA claim: (1) the Act does not apply to agents of the United States; (2) the Act does not apply retroactively; and (3) Alvarez fails to allege exhaustion of remedies in Mexico. The Court finds the second argument compelling.

The TVPA became effective on March 12, 1992 and the alleged torture occurred in April 1990. Whether the Act should be applied retroactively presents a question of first impression.

In the recent case of *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), the Supreme Court clarified the standard for determining whether a statute is to be given retroactive application. The Court reconciled two conflicting canons of statutory construction: (1) that courts should apply the laws currently in effect and (2) that retroactivity is not favored in the law. *Id.* at 1496. The Court summarized the proper analysis as follows:

> the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 1505.

The TVPA does not specify whether it is to be applied to pre-enactment events and Alvarez does not argue that Congress clearly intended such a result. Rather, focusing on the second part of the *Landgraf* analysis, Alvarez asserts that the TVPA does not have retroactive effect.

The *Landgraf* court observed that "deciding when a statute operates 'retroactively' is not always a simple or mechanical test." *Id.* at 1498. The Court explained:

> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Id. at 1499 (citation and footnote omitted).

Landgraf also indicates that retroactivity analysis is facial: the question is not the change in legal consequences sorely with respect to the parties before the court, though the impact on the parties may be illustrative. *See id.* at 1506 (discussing the impact of the compensatory damages provision of Civil Rights Act of 1991, both generally and with respect to the parties). This is because each provision of a statute must apply retroactively to all or to none.

Alvarez argues that the TVPA does not impair any rights because official torture has been condemned universally in the international law context for many years. *See Filartiga*, 630 F.2d at 881-83. He also contends that the TVPA does not increase the liability of torturers since the

Act merely restates their pre-existing liability under the ATCA, 28 U.S.C. § 1350. Both the House and Senate reports state that "[t]he TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, [the ATCA]." H.R. Rep. No. 367, 102d Cong. at 3, *reprinted in* 1992 U.S.C.C.A.N. 84; Sen. Rep. No. 249, 102d Cong., 1st Sess. at 4 (hereinafter "House Report" and "Senate Report"). A district court has observed that the TVPA "codifies the holding in *Filartiga* . . . which assumed subject matter jurisdiction over foreign individuals . . . in the case or torture in violation of international law under" the ATCA. *LaFontant v. Aristide*, 844 F. Supp. 128, 138 (E.D.N.Y. 1994).

While it is evident that the primary purpose of the TVPA was to create a clear statutory remedy for torture and extrajudicial killing as a complement to recovery under the ATCA, the Court finds that the TVPA alters the legal consequences for these misdeeds in two respects. First, as discussed in section I.B.2 above, ATCA claims against federal employees acting in the course of their employment are subject to substitution under the Liability Reform Act. By comparison, federal employees may violate the TVPA if they act under color of foreign authority. TVPA § 2(a), 28 U.S.C. § 1350 Note.[17] It is readily apparent that torture violates the TVPA in addition to international law; thus, a claim under the TVPA falls within the Liability Reform Act's exception for federal statutory claims, 28 U.S.C. § 2679(b)(2)(B).

---

[17] In his signing statement, President Bush expressed his belief that the TVPA "does not permit suits for alleged human rights violations in the context of United States military operations abroad or law enforcement actions." 1992 U.S.C.C.A.N. 84, 92. However, the plain text of the TVPA as well as the House and Senate Committee Reports do not preclude the possibility that a United States employee may violate the Act by operating within the scope of his or her authority *and* under color of law of a foreign sovereign.

Accordingly, while a federal employee is immune from liability for torture under the ATCA, he or she can be liable for torture under the TVPA.

A second feature of the TVPA that represents a departure from actions under the ATCA is that all persons have standing to sue, regardless of citizenship status. Both the House and Senate noted that the TVPA would "enhance the remedy already available to under section 1350 in an important respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a remedy also to U.S. citizens who may have been tortured abroad."

It might be argued that the TVPA's ten-year statute of limitations also renders the Act retroactive in nature. As discussed earlier, one court has held that the statute of limitations under the ATCA is the limitations period of the forum state for personal injury actions, which in California is one year. *Forti*, 672 F. Supp. at 1548-49. Hence, torts time-barred under the ATCA might be actionable under the TVPA. However, the Ninth Circuit has endorsed the principle that "since a statute of limitations is procedural in nature, it is accorded retroactive effect because it does not affect substantive rights." *FDIC v. New Hampshire Ins. Co.*, 953 F.2d 478, 487 (9th Cir. 1991). *Landgraf* is consistent with this approach: the Court stated that "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." 114 S. Ct. at 1502. This is because rules of procedure "regulate secondary rather than primary conduct." *Id.* Thus, at least under the circumstances of this case,[18] the limitation period of

---

[18] The Ninth Circuit stated that a statute of limitations should not be applied retroactively if to do so would revive a stale claim. *New Hampshire Ins. Co.*, 953 F.2d at 487. *Landgraf* also acknowledged that new procedural rules are not applicable in every pending case. 114 S. Ct. at 1502 n.29. In this case, the Court has found that Alvarez's torture claim is not time-barred under the ATCA,

the TVPA does not militate against its retroactive application.

Although torture and extrajudicial killing are egregious, deeply-rooted violations of international law, *Estate II*, 25 F.3d at 1475, *Landgraf* requires assessment of changes in the legal consequences of past acts, however wrongful they may be. Since the TVPA significantly expands liability in the courts of the United States, the Court must find that the Act has retroactive effect. Hence, in the absence of clear congressional intent, retrospective application of the Act is impermissible. The TVPA claim must be dismissed.

IV. Motion to Dismiss on Behalf of the United States

The scope of this motion is quite limited. The United States argues (1) that all but one of the claims under the FTCA are time-barred and (2) that the remaining claim, for prolonged arbitrary detention, is barred by the doctrine of judicial immunity since Judge Rafeedie made the determination to retain Alvarez in custody.[19]

A. The Statute of Limitations

Pursuant to 28 U.S.C. § 2401(b), a tort claim against the United States "shall be forever barred unless it is presented in writing to the appropriate Federal Agency within two years after such claim accrues. . . ." The limitations period "must be strictly observed." *Mann v. United States*, 399 F.2d 672, 673 (9th Cir. 1968). None-

---

so the longer limitations period of the TVPA does not impact Sosa. *See supra*, section III.C.2.

[19] In a footnote in its memorandum of points and authorities, as an aside, the United States assert that it is not liable under *Bivens* and that it is immune with respect to claims based on Mexican and international law pursuant to 28 U.S.C. § 2680(k), the FTCA exception for "[a]ny claim arising in a foreign country." Those arguments are not squarely presented and will not be discussed here.

theless, dismissal based on the statute of limitations is proper "only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Vaughn v. Grijalva*, 927 F.2d 476, 478 (9th Cir. 1991) (quoting *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980)).

The general rule is that a tort claim accrues when the plaintiff is injured, but "[i]n certain cases, usually involving medical malpractice or hidden injuries, the claim does not accrue until the plaintiff knows or in the exercise of reasonable diligence should know of both the injury and its cause." *Dyniewicz v. United States*, 742 F.2d 484, 486 (9th Cir. 1984). Even the when so-called discovery rule is applicable, knowing the cause of one's injury does not require knowledge of who is responsible for causing it; ignorance of the involvement of agents of the United States is irrelevant. *Id.* at 486-87.

Alvarez was abducted on April 2, 1990. Except for his continuing incarceration and a charge that the government withheld certain exculpatory evidence, he alleges no wrong after his arrival in Los Angeles on April 10, 1990. He was released on December 14, 1992. On July 9, 1993, he filed his administrative tort claim. Thus, all of his FTCA claims that accrued before July 9, 1991 and were not tolled are time-barred.

The government concedes that the claim for prolonged arbitrary detention (the fourth cause of action) "falls . . . partly within the two-year limitations period." Alvarez offers several theories as to why the remaining claims are not barred by the statute. First, he argues that since there was a single scheme by the government to violate his rights the Court should apply the continuing wrong doctrine and find that all of his claims accrued on the date of his release, December 14, 1992. Second, he contends that his kidnapping and false imprisonment claims accrued on the date of his release. Third, he invokes the blameless ignorance rule of discovery on the theory that the

full scope of the government's misconduct was not revealed until trial. Fourth, he urges the Court to apply equitable tolling to his claims because he was not in a position to file an administrative tort claim while incarcerated in Los Angeles.

Though it appears that the statute of limitations poses a serious problem for Alvarez, the Court cannot be certain that the statute is insurmountable. Since discovery may strengthen his position, the Court will not now find his claims time-barred.[20]

B. Prolonged Arbitrary Detention Claim

Alvarez's claim for prolonged arbitrary detention is based on international law. First Amd. Complt., para. 35; *See Forti*, 672 F. Supp. at 1541-42. Under the FTCA, the United States is liable in tort for the acts or omissions of its employees to the extent that a private person would be liable to the claimant under the law of the state where the act or omission occurred. 28 U.S.C. § 1346(b). For purposes of this motion, the United States assumes that prolonged arbitrary detention is cognizable under the FTCA.

Judge Rafeedie held four bail hearings during the period that Alvarez was incarcerated. On April 10, 1990 and August 24, 1990, the Judge ordered detention without

---

[20] The Court does note that neither party has cited what appears to be controlling authority in this circuit as to the accrual of false arrest and imprisonment claims. The general rule is that such claims accrue at the time of arrest or imprisonment, not release. *See Matthews v. Macanas*, 990 F.2d 467, 469 (9th Cir. 1993) (false arrest); *Venegas v. Wagner*, 704 F.2d 1144, 1146 (9th Cir. 1983) (false arrest); *Johnson v. Spalding*, 669 F.2d 589 (9th Cir. 1982) (false imprisonment), *cert. denied*, 459 U.S. 942 (1982); *Cline v. Brusett*, 661 F.2d 108, 111 (9th Cir. 1981) (false imprisonment); *see also Cooper v. Franchise Tax Bd.*, 661 F. Supp. 60, 61 (N.D. Cal. 1987) (false arrest). An exception exists where the gravamen of the plaintiff's claim is denial of a fair trial resulting in wrongful conviction and imprisonment. *Venegas*, 704 F.2d at 1146.

bail. After a third hearing on December 16, 1991, Judge Rafeedie set bail at $10 million and declined to reduce that amount after a fourth hearing on February 3, 1992. Alvarez did not post bail and was not released until his acquittal on December 14, 1992.

Judicial immunity provides an absolute bar to tort claims against judicial officers arising from judicial acts unless jurisdiction is clearly absent. *Mireles v. Waco,* 112 S. Ct. 286 (1991); *Forrester v. White,* 484 U.S. 219 (1988); *Dennis v. Sparks,* 449 U.S. 24 (1980); *Stump v. Sparkman,* 435 U.S. 349 (1978). It is beyond dispute that Judge Rafeedie is immunized from personal liability for his bail decisions. To the extent that Alvarez's detention was a judicial act, the United States also is entitled to immunity. Under the FTCA, the United States is "entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim." 28 U.S.C. § 2674.

In his opposition, Alvarez contends that the liability of the United States may be based on the acts of its prosecutorial representatives. Indeed, the government could have dismissed the indictment voluntarily at any time and allowed Alvarez to return to Mexico. However, the decision whether or not to prosecute a given individual is a discretionary function for which the United States is immune. 28 U.S.C. § 2680(a); *Wright v. United States,* 719 F.2d 1032, 1035 (9th Cir. 1983); *cf.* 28 U.S.C. § 2680(h) (claims of false imprisonment, malicious prosecution, etc., based on acts of investigative or law enforcement officers are actionable). Thus, the United States cannot be liable for its policy decision to bring Alvarez to trial.

Since there is no basis for liability, the prolonged arbitrary detention claim against the United States is dismissed.

CONCLUSION

In accord with the foregoing discussion, the Court summarizes its rulings as follows:

The Motion to Dismiss on Behalf of the Individual Federal Defendants is GRANTED IN PART. The United States is substituted for defendants Berellez, Waters, Gruden and Lawn on all but the *Bivens* claim (the fifth claim for relief), and the defendants are granted qualified immunity on the *Bivens* claim with respect to the alleged mistreatment of Alvarez prior to his arrival in the United States.

The United States' motion to Substitute Itself on All Claims Against Defendants Garate-Bustamante and Sosa Except the Constitutional Claims is DENIED without prejudice. Alvarez is entitled to discovery on the relationships between the United States and Garate and Sosa.

The motions to dismiss of Garate and Sosa are GRANTED IN PART. Alvarez fails to state a claim under *Bivens* insofar as he complains of events occurring in Mexico since he was not vested with Fourth or Fifth Amendment rights while outside of the United States. The TVPA claim is dismissed because the Act does not apply to events antedating its enactment.

The Motion to Dismiss on Behalf of the United States is GRANTED IN PART. The United States is immune from suit with respect to the claim for prolonged arbitrary detention.

IT IS SO ORDERED.

Dated: Aug. 30, 1994

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

APPENDIX D

[Filed Feb. 27, 1997]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-55464
D.C. No. CV 93-04072-JGD

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellee,
v.

UNITED STATES OF AMERICA;
ANTONIO GARATE-BUSTAMANTE;
FRANCISCO SOSA,
Defendants,
and

HECTOR BERELLEZ; BILL WATERS;
PETE GRUDEN; JACK LAWN,
Defendants-Appellants.

No. 95-55768
D.C. No. CV 93-04072-JGD

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellee,
v.

UNITED STATES OF AMERICA, *et al.*,
Defendant-Appellant.

No. 95-56121
D.C. No. CV 93-04072-JGD

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant,

and

FRANCISCO SOSA;
ANTONIO GARATE-BUSTAMANTE,
Defendants-Appellees.

ORDER

Before: GOODWIN and SCHROEDER, Circuit Judges, and KING*, District Judge.

With the filing of the amended opinion, the panel has voted unanimously to deny the petitions for rehearing. Judge Schroeder voted to reject the suggestions for rehearing en banc, and Judges Goodwin and King so recommend.

The full court has been advised of the suggestions for rehearing en banc and no active judge has requested a vote on whether to rehear the matters en banc. Fed. R. App. P. 35.

All petitions for rehearing are DENIED and all the suggestions for rehearing en banc are REJECTED.

---

* Honorable Samuel P. King, United States District Judge for the District of Hawaii, sitting by designation.

(2)

Supreme Court, U.S.
FILED
JUN 27 1997

No. 96-1890

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HECTOR BERELLEZ, BILL WATERS,
PETE GRUDEN and JACK LAWN,
Petitioners,

vs.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALAN RUBIN
EPSTEIN, ADELSON & RUBIN
11835 West Olympic Boulevard
Suite 1235
Los Angeles, California 90057
(310) 473-6447

PETER SCHEY
CENTER FOR HUMAN RIGHTS & CONSTITUTIONAL LAW
256 South Occidental Boulevard
Los Angeles, California 90057
(213) 388-8693

PAUL L. HOFFMAN
Counsel of Record
DILAN A. ESPER
JOAN FITZPATRICK
RALPH G. STEINHARDT, III
ERWIN CHEMERINSKY
SILVIA R. ARGUETA
ROBIN S. TOMA
ALAN CASTILLO
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 977-9500

Attorneys for Respondent

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

23 pp

QUESTIONS PRESENTED

1. Whether this court should review the decisions of the District Court and the Ninth Circuit to deny Petitioners' motions to dismiss before Respondent has had an opportunity to amend his Complaint to state with more particularity violations of Respondent's constitutional rights inside the United States where Respondent originally alleged a course of outrageous government conduct occurring in Mexico and the United States as a basis for his Bivens claims.

2. Whether Petitioners can raise before this Court the issue of whether a heightened pleading standard applies to Respondent's Complaint when Petitioners did not raise that issue before either the District Court or the Court of Appeals.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 6

A. There Is No Persuasive Reason For This Court To Review The District Court And Court Of Appeals' Decisions Not To Dismiss Respondent's Complaint At This Stage Of This Action Before Respondent Has Had An Opportunity To Amend His Complaint, If Necessary... 6

B. Petitioners Have Waived Any Argument That A Heightened Pleading Standard Applies To This Case; In Any Event, This Case Does Not Present The Issue Squarely For Review. 14

CONCLUSION 16

TABLE OF AUTHORITIES

CASES	PAGE(S)
Act Up!/Portland v. Bagley, 988 F.2d 868 (9th Cir. 1993)	12
Anderson v. Creighton, 483 U.S. 635 (1987)	11
Behrens v. Pelletier, 133 L.Ed.2d 773 (1996)	8
Collins v. Cundy, 603 F.2d 825 (10th Cir. 1979)	11
Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992)	9
Conley v. Gibson, 355 U.S. 41 (1957)	7
Crawford-El v. Britton, 93 F.3 813 (D.C. Cir. 1996) (en banc), petition for cert. filed No. 96-827 (Nov. 25, 1996).	15
Darwin v. Connecticut, 391 U.S. 346 (1968)	10

Dunbar Corp. v Lindsey,
905 F.2d 754 (9th Cir. 1990) 15

Duncan v. Nelson,
466 F.2d 939 (7th Cir. 1972) 9

Fluellen v. Drug Enforcement Agency,
816 F.Supp. 1206 (E.D.Mich. 1993) 9

Garrity v. New Jersey,
385 U.S. 493 (1967) 10

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 11

Hoptowit v. Ray,
682 F.2d 1237 (9th Cir. 1982) 7

Hunter v. Bryant,
502 U.S. 224 (1991) 11

Kartseva v. Department of State,
37 F.3d 1524 (D.C. Cir. 1994) 15

Martin v. Sargent,
780 F.2d 1334 (9th Cir. 1985) 10

Mendoza v. Block,
27 F.3d 1357 (9th Cir. 1994) 11

Oltarzewski v. Ruggiero,
830 F.2d 136 (9th Cir. 1987) 10

Paul v. Davis,
424 U.S. 693 (1976) 9

Pritchett v. Alford,
973 F.2d 307 (4th Cir. 1992) 8, 12

Reynolds v. County of San Diego,
84 F.3d 1162 (9th Cir. 1996) 11

Rex v. Teeples,
753 F.2d 840 (10th Cir. 1985) 9

Siegert v. Gilley,
500 U.S. 226 (1991) ..... PASSIM

Somers v. Thurman,
109 F.3d 614 (9th Cir. 1997) 11

Taylor v. List,
880 F.2d 1040 (9th Cir. 1989) 13

Thomas v. Cabanow,
978 F.2d 1261 (7th Cir. 1992) 11

Triad Assocs, Inc. v. Robinson,
10 F.3d 492 (7th Cir. 1993) 8, 12

Veney v. Hogan,
70 F.3d 917 (6th Cir. 1995) 13, 15

Weaver v. Brenner,
40 F.3d 527 (2nd Cir. 1994) 9

Wicks v. Mississippi State Employment Services,
41 F.3d 991 (5th Cir. 1995) 13, 14, 15

Ybarra v. Reno Thunderbird Mobile Home Village,
723 F.2d 675 (9th Cir. 1984) 13

STATUTES

Fed. R. Civ. Proc. 12(b) 3
Fed. R. Civ. Proc. 12(e) 7

96-1890

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

HECTOR BERELLEZ, BILL WATERS,
PETE GRUDEN and JACK LAWN
Petitioners,

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Humberto Alvarez-Machain submits this brief in opposition to the Petition for a Writ of Certiorari in this case filed by Petitioners Hector Berellez, Bill Waters, Pete Gruden and Jack Lawn.

STATEMENT OF THE CASE

Respondent Humberto Alvarez-Machain alleges in his Amended Complaint ("Complaint") in this action that he was abducted from his home in Mexico, tortured, and forcibly brought to the United States by agents of the United States government to stand trial for the murder of Drug Enforcement Administration (hereinafter "DEA") Special Agent Enrique Camarena Salazar. After arriving in the United States, Respondent alleges that he was deprived of food, subjected to coercive threats in the aftermath of his torture, and imprisoned under a false name so that his relatives could not contact him. The facts are set out in more detail by the trial court in its Memorandum Opinion, see Pet. App. 30a-34a, and are summarized here.[1]

On April 2, 1990, Respondent was abducted at gunpoint from his medical offices in Guadalajara, Mexico. He was then punched in the stomach, subjected to electric shocks, and twice injected with an unknown substance that made him light-headed and dizzy. Respondent was then

---

[1]As no discovery has yet taken place and this Petition arises from a motion to dismiss, all facts are viewed in the light most favorable to Respondent. Petitioners recite in the "Statement of the Case" section of their Petition several "facts" that Petitioners contend were found by the District Court in Respondent's criminal prosecution. Pet. Cert. 3-8. This Petition must be evaluated only in the context of the allegations of Respondent's Complaint.

transported by private plane to El Paso, where he arrived on April 3. Petitioner Hector Berellez and others met Respondent on the runway and took him into custody.

Respondent was taken to another location and interrogated. He was deprived of food and subjected to verbal threats during this period. On April 4, Respondent complained of chest pains and received medical treatment in El Paso. Until April 10, when he was transported to Los Angeles, the government purposefully identified Respondent with a pseudonym. Respondent was then transported to Los Angeles for arraignment. On December 14, 1992, after two years of continuous imprisonment, the District Court granted Respondent's motion for acquittal on all charges.

On July 9, 1993, Respondent initiated this action seeking damages under various constitutional and tort theories. In formulating his Bivens claims against these Petitioners, Respondent did not distinguish between the portions of his claims based on acts occurring in Mexico and acts occurring in the United States. The various Defendants moved for dismissal of all claims under Fed. R. Civ. Proc. 12(b), on grounds of lack of personal jurisdiction, lack of subject matter jurisdiction, and failure to state a claim under which relief could be granted. The trial court granted the motions in part and denied them in part. Pet. App. 29a-76a.

The bulk of the trial court's Memorandum Opinion is not before this Court; however, the holdings that are before this Court are set forth below:

The District Court held that Respondent's allegations of torture and inhumane treatment occurring in Mexico did not state a cause of action under Bivens because Petitioners were shielded by qualified immunity from suit since it was not clearly established as of April 1990 that the Fourth or Fifth Amendments applied to the torture of an alien outside the United States. Pet. App. 44a-51a.

The District Court held that Respondent had stated four "potential constitutional violations" which occurred after Respondent arrived in the United States. First, DEA agents, including Petitioner Berellez, threatened Respondent while interrogating him; second, the agents denied Respondent food during his imprisonment; third, Respondent was incarcerated under a false name, making it impossible for Respondent to be reached by his relatives, counsel, or the Mexican government; and fourth, Respondent was threatened, locked in a small windowless room, forced to stand naked, and photographed. Pet. App. 51a-52a.[2]

During the course of the hearing on Petitioners' motion, the District Court noted that Respondent might need to amend his complaint before proceeding with discovery. However, the District Court's order did not require

---

[2]This fourth violation was alleged in Respondent's Complaint, but the District Court noted that it was unsure whether Respondent was alleging that it amounted to a constitutional tort. Pet. App. 52a n. 10. Respondent does assert claims based on this conduct.

respondent to amend his complaint. Pet. App. 76a The interlocutory appeals filed by Petitioner in March 1995 and the District Court's subsequent stay of all trial court proceedings has made it impossible for Respondent to amend his complaint.

Significantly, the District Court noted that under Ninth Circuit law, "[a] heightened pleading standard applies to Bivens cases where the defendant is entitled to assert the qualified immunity defense and where her or his knowledge or intent is an element of the plaintiff's constitutional tort.... *The defendants do not argue that the heightened standard should apply in this case."* Pet. App. 52a n. 11 (emphasis added).

The Ninth Circuit's amended opinion affirmed the District Court's denial of Petitioners' motion to dismiss Respondent's claims of constitutional violations within the United States. The Ninth Circuit held that Respondent's allegations, if proven, could state claims under the Fifth Amendment Due Process clause standard for pre-trial detainees. Pet. App. 9a-10a. The Ninth Circuit affirmed the District Court's ruling that Respondent could not assert a Fifth Amendment Due Process claim for acts occurring in Mexico because of the prior criminal proceedings in this case. Pet. App. 10a-11a.

After the issuance of the District Court's Memorandum Opinion, the District Court stayed this action pending the determination of interlocutory appeals. At such time as the stay is lifted, Respondent intends to move to amend his Complaint, if necessary, to state the violations of

Respondent's constitutional rights which occurred after Respondent arrived in the United States in more detail. To date virtually nothing has happened in this action for more than three years since Petitioners filed their motion to dismiss.

REASONS FOR DENYING THE WRIT

A. There Is No Persuasive Reason For This Court To Review The District Court And Court Of Appeals' Decisions Not To Dismiss Respondent's Complaint At This Stage Of This Action Before Respondent Has Had An Opportunity To Amend His Complaint, If Necessary.

Respondent's Bivens claims against these Petitioners were framed as a continuing course of conduct by Petitioners, both outside and inside the United States, which violated Respondent's Fourth and Fifth Amendment rights. Respondent's position was that the Fifth Amendment applied extraterritorially to limit the U.S. Government's conduct in Mexico as well as functioning as a limitation against the Government's conduct within our borders. The District Court ruled against Respondent on this issue. Pet. App. 44a-51a.[3]

---

[3]The Ninth Circuit also found that Respondent may not bring a Fifth Amendment Due Process claim based on his mistreatment in Mexico, on different grounds. Pet. App. 10a-11a.

Both the District Court and the Court of Appeals recognized that dismissal of Respondent's Complaint at this initial stage of the case without allowing Respondent leave to flesh out his allegations of misconduct within the United States would elevate form over substance by dismissing a complaint that both lower courts held potentially states causes of action for violations of the Constitution. See Pet. App. 52a (District Court: "Alvarez may be able to prove that the defendants violated his clearly established constitutional rights and will be given the opportunity to obtain such proof."), 10a (Court of Appeals: "Each of these allegations, if proven, served to create an atmosphere of fear and isolation, imposing 'gratuitous suffering' in violation of Hoptowit [v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982)].").

Not only were the District Court and the Court of Appeals correct; any other ruling would have been an abuse of discretion. "In appraising the sufficiency of the complaint..., the accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Nothing in this Court's precedents regarding qualified immunity displaces this longstanding rule that protects plaintiffs from having their complaints dismissed before they have had a full opportunity to state their claims.

Rather, the remedy for a pleading that does not state its claims with sufficient particularity is a motion for a more definite statement, Fed. R. Civ. Proc. 12(e); if granted, the

motion forces the plaintiff to amend his or her complaint to state his or her claims with more particularity under penalty of striking the complaint.

Behrens v. Pelletier, 133 L. Ed. 2d 773 (1996), cited by Petitioners, supports this approach. Behrens holds that a defendant is not barred from appealing an adverse determination of a qualified immunity issue on summary judgment by the fact that the defendant has already appealed, and lost, the qualified immunity issue in the motion to dismiss stage. Id. at 786. Under Behrens, Petitioners' right to qualified immunity, if it exists at all, will be fully protected, because the Court of Appeals' decision will not preclude Petitioners from reviewing their motion when the legal issues pertinent to qualified immunity are squarely presented for decision.

Petitioners' attempt to create a conflict between the qualified immunity standard applied by the Ninth Circuit and the standard applied by other circuit courts. There is no such conflict. As Petitioners essentially concede, the Ninth Circuit applied the same test applied by other circuits on this issue, following the decisions of this Court. See, e.g., Triad Assocs, Inc. v. Robinson, 10 F.3d 492, 496 (7th Cir. 1993); Pritchett v. Alford, 973 F.2d 307, 312 (4th Cir. 1992). Even if a such conflict existed, this case is an inappropriate vehicle for resolving any such conflict.

Petitioners claim, essentially, that the Court of Appeals erred in applying a two-part, rather than a three-part, test for determining whether Respondent's Complaint should be dismissed on the ground of qualified immunity. Pet. Cert.

9-10. However, the District Court and the Court of Appeals wisely denied Petitioners' motion because Respondent has not been afforded an opportunity to amend his Complaint to allege the constitutional claims with greater particularity; Respondent's Complaint originally sought to allege a course of conduct both inside and outside the United States which violated the Constitution but Respondent lost his claim that the Fifth Amendment applied to the Government's extraterritorial conduct. In such a case, it is prudent to allow Respondent to allege the remaining constitutional claims with particularity, especially where, as here, the claims stated potential constitutional violations even in their current form.

Petitioners ignore the fact that many cases limit abusive government conduct during custodial interrogation and find that such conduct gives rise to civil liability. See, e.g., Cooper v. Dupnik, 963 F.2d 1220 (9th Cir.) (en banc), cert. denied, 121 L.Ed. 2d 332 (1992); Weaver v. Brenner, 40 F.3d 527 (2nd Cir. 1994): Duncan v. Nelson, 466 F.2d 939 (7th Cir.) cert. denied, 409 U.S. 894 (1972). See also Rex v. Teeples, 753 F.2d 840, 843 (10th Cir. 1985); Fluellen v. Drug Enforcement Agency, 816 F.Supp. 1206 (E.D. Mich. 1993).

Specifically, none of the other cases cited by Petitioners involve this unique factual situation. In Siegert v. Gilley, 500 U.S. 226, 233 (1991), the Court reversed the denial of a motion to dismiss where the plaintiff's allegations could not under any construction support the conclusion that *any* constitutional right was violated, as the Court had specifically rejected the same claim in Paul v. Davis, 424

U.S. 693 (1976). Here, even Petitioners concede that one of the four potential constitutional violations identified by the District Court, the denial of food, could, if serious enough, "reach constitutional proportions." Pet. Cert.13 . As for the other three potential constitutional violations identified by the District Court, these claims also state constitutional claims. Petitioners do not even argue that locking a pre-trial detainee in a windowless room naked, threatening the person, and photographing the detainee does not constitute a constitutional violation.

Petitioners have not shown that incommunicado incarceration can never violate a pre-trial detainee's constitutional rights, either. See, e.g., Darwin v. Connecticut, 391 U.S. 346, 349 (1968) (per curiam) (holding confession involuntary and inadmissible where it was procured after 30 to 48 hours of incommunicado incarceration).

Nor do the cases cited by Petitioners, Pet. Cert. 13, establish that threats can never rise to the level of a constitutional violation. For instance, a law enforcement officer who threatened government employees with termination of employment if they did not incriminate themselves was held to have violated the employees' Fifth Amendment rights. Garrity v. New Jersey, 385 U.S. 493, 496 (1967). The cases cited by Petitioners at the most merely hold that profane language and generic threats by prison guards to make life difficult for prisoners may not amount to constitutional violations. Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) (profanity); Martin v. Sargent, 780 F.2d 1334, 1338 (9th Cir. 1985)

(threat by prison guard to give prisoner a bad time in prison). Collins v. Cundy, 603 F.2d 825, 827 (10th Cir. 1979), did not involve a threat or even mention the word "threat" in the opinion, while Thomas v. Cabanow, 978 F.2d 1261 (7th Cir. 1992), affirming the unpublished opinion cited by Petitioners, assumed arguendo that a prison official could be held liable for failing to protect a prisoner who was threatened, a more tenuous constitutional claim than a direct threat from a governmental officer. These cases do not present the same coercive, intimidating context in which Respondent's claims arise.

The remainder of the cases cited by Petitioners either involve summary judgment motions, where the plaintiff has had a chance in evidentiary declarations to flesh out the allegations of his or her complaint, or support Respondent's position that the District Court and Court of Appeals acted properly in not dismissing Respondent's Complaint without affording Respondent an opportunity to amend. Harlow v. Fitzgerald, 457 U.S. 800, 819--820 (1982) (remanding for further proceedings where denial of *summary judgment* was entered on qualified immunity issue based on incorrect standard); Anderson v. Creighton, 483 U.S. 635, 646 (1987) (remanding for further proceedings after reversal of *summary judgment* for officer); Hunter v. Bryant, 502 U.S. 224, 229 (1991) (per curiam) (reversing order denying *summary judgment*); Somers v. Thurman, 109 F.3d 614, 616 (9th Cir. 1997) (reversing order denying *summary judgment*); Reynolds v. County of San Diego, 84 F.3d 1162, 1170 (9th Cir. 1996) (affirming order granting *summary judgment*); Mendoza v. Block, 27 F.3d 1357 (9th Cir. 1994) (affirming dismissal of claim based on qualified

immunity *after evidentiary hearing in District Court*); Triad Assocs. v. Robinson, 10 F.3d 492, 497-98 (7th Cir. 1993) (affirming denial of motion to dismiss; distinguishing summary judgment situation where plaintiff must do more than allege constitutional violations in general terms); Act Up!/Portland v. Bagley, 988 F.2d 868, 873 (9th Cir. 1993) (reversing order denying *summary judgment*); Pritchett v. Alford, 973 F.2d 307, 318 (4th Cir. 1992) (affirming denial of *summary judgment*).

Petitioners' implication that the qualified immunity test used by the Court of Appeals is somehow inconsistent with this Court's holding in Siegert is incorrect. Siegert, as noted above, held that a defendant is entitled to qualified immunity at the motion to dismiss stage where the complaint fails to state facts sufficient to state a constitutional violation. As the Seventh Circuit persuasively explained, Siegert does not call into question the two-part test used by the Ninth Circuit in this case and by all other circuits; rather, "Siegert... only indicate[s] that determining that alleged conduct does not establish a prima facie constitutional claim serves as a logical shortcut to finding that the alleged conduct did not violate clearly established constitutional standards". Triad Assocs., 10 F.3d at 497 n.2. Thus, Siegert's holding is subsumed in the test that the Court of Appeals used. Thus, the Ninth Circuit's decision does not conflict with any decisions of this Court and there is no need for review on this basis.

Nor is there any basis to Petitioners' contention that the Court of Appeals' ruling was erroneous in denying the motion to dismiss on the ground that Respondent's

complaint allegedly did not allege with sufficient particularity the involvement of the individual Petitioners.

First, Taylor v. List, 880 F.2d 1040, 1045-1046 (9th Cir. 1989), and Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 680-81 (9th Cir. 1984), were summary judgment cases which have nothing to say on the issue of whether individual defendants' conduct must be *pleaded*. Siegert, as discussed above, merely holds that where a complaint fails to allege *conduct* that violates the Constitution, that complaint can be dismissed. Siegert has nothing to say about whether the allegations need be individualized.

In Veney v. Hogan, 70 F.3d 917, 922 (6th Cir. 1995) (emphasis added), the court held that "*if [the plaintiff's] original complaint is deficient [in alleging particular facts to support the denial of qualified immunity, the plaintiff] must amend his [or her] complaint*" to allege the facts with more particularity. Respondent, of course, has had no opportunity to amend his Complaint in response to the ruling on Petitioners' motion to dismiss. In any event, in Veney, the gravamen of the plaintiff's claim was wrongful denial of a promotion, and the court reasoned that the plaintiff had known who was involved in the denial of his promotion and how. Id. A similar assumption cannot be made here, where Respondent cannot without discovery learn who was responsible for the conduct alleged in the Complaint.

Finally, Wicks v. Mississippi State Employment Services., 41 F.3d 991, 994-95 (5th Cir.), cert. denied, 132 L. Ed. 2d

809 (1995), again involves a claim of wrongful denial of a promotion, and in Wicks, there was no issue of failing to identify which defendant was responsible for what which conduct. Additionally, Wicks applies a heightened pleading standard; Petitioners have waived any right to seek such a standard here.

B. Petitioners Waived Any Argument That A Heightened Pleading Standard Applies To This Case; In Any Event, This Case Does Not Present The Issue Squarely for Review.

In its Memorandum Opinion, the District Court noted that under Ninth Circuit law, "[a] heightened pleading standard applies to Bivens cases where the defendant is entitled to assert the qualified immunity defense and where her or his knowledge or intent is an element of the plaintiff's constitutional tort.... *The defendants do not argue that the heightened standard should apply in this case.*" Pet. App. 52a n. 11 (emphasis added). Petitioners never asked for reconsideration of this decision in the District Court.

On appeal, Petitioners had a full opportunity to brief any claims that the District Court erred. Once again, Petitioners did not raise the issue of whether a heightened pleading standard applied.[4] Under these circumstances, Petitioners

---

[4]Petitioners admit they failed to raise this issue below. Pet. Cert. 18 n. 12. However, Petitioners asserted that since they argued that the Complaint failed to state the facts with sufficient specificity, Petitioners have not

have waived the issue.

Even if Petitioners had not waived this issue, this is not the proper case to resolve the conflict on this issue. The cases cited by Petitioners do not mandate that a Complaint that fails to meet the heightened pleading standard be dismissed prior to amendment. Veney, 70 F.3d at 922 (no dismissal for failing to plead with specificity until plaintiff has opportunity to amend); Wicks, 41 F.3d at 997 (same); Kartseva v. Department of State, 37 F.3d 1524, 1530 (D.C. Cir. 1994) (dismissing under Siegert where complaint fails to state any constitutional violation; does not reach opportunity to amend issue); Dunbar Corp. v. Lindsey, 905 F.2d 754, 764 (4th Cir. 1990) (holds complaint meets standard and does not address opportunity to amend issue).[5] There is thus

---

waived this issue. This analysis is without merit. Faced with an order of the District Court that clearly stated that Petitioners *had not* argued for a heightened pleading standard, Petitioners' proper recourse was to move for reconsideration of that order to preserve the issue if they felt that the District Court's conclusion was incorrect, or at the very least, to raise the issue before the Court of Appeals.

[5]Crawford-El v. Britton, 93 F.3d 813, 823 (D.C. Cir.) (en banc), pet. for cert. filed, No. 96-827 (Nov. 25, 1996), actually holds that a heightened pleading standard is not required except in cases where specific intent is at issue and is thus not in conflict with the Ninth Circuit at all on this issue. Opinion, see Pet. App. 30a-34a, and are

no conflict on the issue here, i.e., whether a complaint should be dismissed that alleges a pattern of conduct, some of which contains potential constitutional violations, before the plaintiff has had an opportunity to amend to flesh out the factual allegations in his Complaint

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: June 27, 1997

Respectfully submitted,

Paul L. Hoffman
Counsel of Record
Dilan A. Esper
Joan Fitzpatrick
Ralph Steinhardt, III
Erwin Chemerinsky
Silvia R. Argueta
Robin S. Toma
Alan Castillo
Alan Rubin
Peter Schey

---

summarized here.

Supreme Court, U.S.
FILED
JUL 10 1997
CLERK

(3)

No. 96-1890

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HECTOR BERELLEZ, BILL WATERS,
PETE GRUDEN and JACK LAWN,
Petitioners,

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR PETITIONERS

MICHAEL L. MARTINEZ
Counsel of Record
GLORIA B. SOLOMON
HOLLAND & KNIGHT LLP
2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037
(202) 955-3000
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

9pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. RESPONDENT'S ARGUMENT THAT HE NEEDS TO AMEND THE COMPLAINT AND TAKE DISCOVERY IS WITHOUT MERIT	2
II. RESPONDENT HAS FAILED TO IDENTIFY ANY VIOLATION OF CLEARLY ESTABLISHED LAW	4
III. RESPONDENT MISCONSTRUES PETITIONERS' ARGUMENT CONCERNING THE APPLICABLE LEGAL STANDARD FOR MOTIONS TO DISMISS ASSERTING QUALIFIED IMMUNITY	5
CONCLUSION	6

TABLE OF AUTHORTIES

Cases	Page
Butz v. Economou, 438 U.S. 478 (1978)	3
Collins v. Cundy, 603 F.2d 825 (10th Cir. 1979)	5
Crawford-El v. Britton, 65 U.S.L.W. 3817 (June 17, 1997)	6
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	1, 3
Hunter v. Bryant, 502 U.S. 224 (1991)	2
May v. Baldwin, 109 F.3d 557 (9th Cir. 1997)	4
Mitchell v. Forsyth, 472 U.S. 511 (1985)	2
Oltarzewski v. Ruggiero, 830 F.2d 136 (9th Cir. 1987)	5
Siegert v. Gilley, 500 U.S. 226 (1991)	3
Veney v. Hogan, 70 F.3d 917 (6th Cir. 1995)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1890

HECTOR BERELLEZ, BILL WATERS, PETE GRUDEN and JACK LAWN,
Petitioners,

v.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR PETITIONERS

The respondent's asserted bases for denying certiorari in this case are meritless. Importantly, respondent fails to grapple substantively with the issues presented by petitioners and argues instead that such issues should await further amendment of the complaint and discovery. That, however, is precisely what the qualified immunity doctrine in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and its progeny is intended to prevent.

I. RESPONDENT'S ARGUMENT THAT HE NEEDS TO AMEND THE COMPLAINT AND TAKE DISCOVERY IS WITHOUT MERIT.

Respondent's principal argument against certiorari is that the district court and the Ninth Circuit were correct in not dismissing his first amended complaint "without allowing Respondent leave to flesh out his allegations of misconduct." Resp. Br. at 7. Respondent further states that the district court stayed all proceedings following petitioners' notice of appeal thereby "ma[king] it impossible for Respondent to amend his complaint." Resp. Br. at 5. He "intends" once the stay is lifted "to move to amend his Complaint, if necessary." *Id.*

Respondent's argument is erroneous at best and disingenuous at worst. The district court invoked no such prohibition. To the contrary, on May 2, 1995, the district court entered an Order stating that "all proceedings [are] stayed pending appeal, *except Plaintiff may file a motion to amend his complaint*" (emphasis supplied). The district court has never precluded respondent from amending his complaint and he has never sought to do so.[1]

Moreover, respondent's argument is antithetical to the Court's precedents. The Court has repeatedly emphasized that the "essence" of qualified immunity is the "entitlement not to stand trial or face the other burdens of litigation," *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985), including "broad-ranging discovery" that can be "peculiarly disruptive of effective government." *Harlow,* 457 U.S. at 817. Thus, this Court has admonished the lower courts vigorously to apply qualified immunity "at the earliest possible stage in litigation." *Hunter v. Bryant,* 502 U.S. 224, 227 (1991). "Until this threshold immunity question is resolved, discovery should not be al-

[1] Respondent did amend his complaint early in this case and well before the district court's January 23, 1995 memorandum opinion and order denying petitioners qualified immunity.

lowed." *Siegert v. Gilley*, 500 U.S. 226, 231 (1991), quoting *Harlow*, 457 U.S. at 818. Importantly, the Court recognized in *Siegert* that

> [a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.

500 U.S. at 232. Although that statement was made in the context of a motion for summary judgment asserting qualified immunity, a logical corollary is that respondent can withstand a motion to dismiss asserting qualified immunity only if he, at a minimum, has stated facts in his complaint sufficient to establish a violation of clearly established law. Indeed, as the Court recognized in *Butz v. Economou*, 438 U.S. 478, 507-08 (1978),

> [i]nsubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss.

Respondent has failed to meet his burden and nothing he says in his opposition brief undermines that conclusion. He has alleged no facts to justify a denial of qualified immunity to petitioners. The district court readily acknowledged the deficiencies in the amended complaint but nonetheless concluded respondent may engage in discovery because he "may be able to prove" that the petitioners violated his constitutional rights. Appendix at 52a. The Ninth Circuit in turn both erroneously relied on withdrawn allegations and failed to engage in the appropriate legal analysis of the asserted claims mandated by both its own and this Court's precedents. Appendix at 10a, 23a-24a.

The bottom line is that absent the issuance of a writ of certiorari by this Court, petitioners will be forced to

engage in the very burdens of protracted and distracting litigation that this Court has decried on many occasions. If the factually threadbare amended complaint in this case can withstand a qualified immunity motion to dismiss, the promise of immunity and an "early exit" from litigation has indeed become illusory. *Veney v. Hogan,* 70 F.3d 917, 922 (6th Cir. 1995).[2]

II. RESPONDENT HAS FAILED TO IDENTIFY ANY VIOLATION OF CLEARLY ESTABLISHED LAW.

In an apparent effort to get around the Ninth Circuit's abdication of its responsibility to examine whether each of the alleged constitutional violations is violative of clearly established law, respondent attempts the effort. First, respondent simply states without elucidation that petitioners concede the denial of food can sometimes rise to a constitutional violation. Resp. Br. at 10. Although that is true, respondent utterly ignores petitioners' point that the factual allegations of his amended complaint make it impossible to conclude that any denial of food to respondent—if it occurred—rose to the level of a constitutional violation. Indeed, the Ninth Circuit itself recently held that inadequate factual allegations concerning food deprivation do not state a constitutional violation. *May v. Baldwin,* 109 F.3d 557, 566 (9th Cir. 1997).

Second, respondent's implication that petitioners made a concession by not addressing the allegation that respondent was locked naked in a windowless room, photographed and threatened, Resp. Br. at 10, is devoid of merit. Petitioners did not argue this point because even the district court did not adopt it. That court explicitly noted in its opinion that "[i]t is unclear whether Alvarez claims that this incident amounted to a constitutional tort." Appendix at 52a n.10. Thus, the court ignored the point.

---

[2] Respondent's argument that he needs discovery is also without merit because he was present at the events he calls into question. Discovery will thus shed no additional light on the facts.

Third, respondent argues that petitioners have failed to demonstrate "that incommunicado incarceration can never violate a pre-trial detainee's constitutional rights." Resp. Br. at 10. Respondent's analysis is backwards. It is his burden, not petitioners', to demonstrate that the law in this area is clearly established. If petitioners can demonstrate, as they have, that the law is not clearly established then qualified immunity must be accorded to petitioners.

Fourth, respondent argues that none of the cases cited by petitioners "establish that threats can never rise to the level of a constitutional violation." Resp. Br. at 10. Again, respondent's analysis is backwards. Petitioners need show only that the law is not clearly established. The cases cited by petitioners do that, as "[v]erbal harassment or abuse" of prisoners "is not sufficient to state a constitutional deprivation." *Oltarzewski v. Ruggiero,* 830 F.2d 136, 139 (9th Cir. 1987), quoting *Collins v. Cundy,* 603 F.2d 825, 827 (10th Cir. 1979). Moreover, the threats in those and the other cases cited by petitioners were explicit. Here the amended complaint does not tell us what threats were made and by whom and thus the petitioners should be accorded qualified immunity here as well.

Fifth and finally, respondent, like the courts below, completely ignores the second prong of the qualified immunity inquiry—whether the petitioners' conduct, as alleged by the amended complaint, was objectively reasonable.

III. RESPONDENT MISCONSTRUES PETITIONERS' ARGUMENT CONCERNING THE APPLICABLE LEGAL STANDARD FOR MOTIONS TO DISMISS ASSERTING QUALIFIED IMMUNITY.

Respondent argues that petitioners have waived any argument that a heightened pleading standard applies to this case. This misconstrues petitioners' argument. Petitioners have not argued that a heightened pleading standard applies here. Rather, petitioners argue that the appro-

priate legal standard applicable to a motion to dismiss asserting qualified immunity is an important issue the Court should decide.[3]

This case is an excellent vehicle for that issue because it presents a complaint which is virtually devoid of factual allegations concerning petitioners' alleged wrongdoing. Indeed, as to the petitioners other than Berellez, respondent's complaint contains *no allegation at all* that they even participated in any of the activities which underlie respondent's surviving claims. The Ninth Circuit's decision to permit this complaint to survive a motion to dismiss, if allowed to stand, would permit any plaintiff to engage in discovery of government officials on the basis of nothing more than conclusory allegations of constitutional violations by another official in their agency. This is precisely the result that the doctrine of qualified immunity is designed to prevent.

CONCLUSION

For each of the foregoing reasons, and for the reasons set forth in petitioners' opening brief, the petition for certiorari should be granted.

Respectfully submitted,

MICHAEL L. MARTINEZ
Counsel of Record
GLORIA B. SOLOMON
HOLLAND & KNIGHT LLP
2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037
(202) 955-3000
Counsel for Petitioners

---

[3] The Court recently granted certiorari in *Crawford-El v. Britton*, 65 U.S.L.W. 3817 (June 17, 1997), to address the question, different than that presented here, of whether and what heightened pleading standard applies in constitutional tort cases asserting an improper motive. That case, unlike this one, arises in the context of a motion for summary judgment.